Supreme Court, U.S.
FILED
971485 MAR 6 1998
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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM 1997

PHILIP COATES, DIRECTOR OF THE
MASSACHUSETTS DIVISION OF MARINE FISHERIES, ET AL.,
Petitioners,

v.

RICHARD MAX STRAHAN,
Respondent.

PETITION FOR A WIRT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED.

1. Whether state regulatory officials commit a "taking" under the federal Endangered Species Act ("ESA" or "the Act") by enacting and enforcing regulations that protect endangered whales in some ways, but do not eliminate all risk that private, state-licensed fishermen might violate the ESA.

2. Whether, if construed to make state regulators liable for such decisions, the ESA violates the Tenth Amendment to the United States Constitution and constitutional principles of federalism, as most recently construed in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 117 S. Ct. 2365 (1997).

3. Whether, in a case against state regulatory officials, the proximate cause requirement of the ESA (*Babitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995)) is met by showing that the State licenses private actors who may proceed to violate the ESA in contravention of both state and federal law.

PARTIES TO THE PROCEEDING.

The plaintiff is Richard Max Strahan. The defendants are Philip Coates, Director of the Massachusetts Division of Marine Fisheries ("DMF"); Trudy Coxe, Secretary of the Massachusetts Executive Office of Environmental Affairs ("EOEA"); and John Phillips, Commissioner of the Massachusetts Department of Fisheries, Wildlife, and Environmental Law Enforcement (the "Department"). The Conservation Law Foundation, Inc. appeared and argued as amicus curiae in support of the plaintiff in both the District and Circuit Courts.

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PHILIP COATES, DIRECTOR,
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RICHARD MAX STRAHAN,
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PETITION FOR A WRIT OF CERTIORARI

The defendants, Philip Coates, Director of DMF; John Phillips, Commissioner of the Department; and Trudy Coxe, Secretary of EOEA (collectively the "defendants") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the First Circuit is reported at 127 F.3d 155 (1997) and is reproduced as Appendix A ("App. A") hereto. The decision of the United States District Court for the District of Massachusetts is reported at 939 F. Supp. 963 (1996) and is reproduced as Appendix B ("App. B") hereto.

JURISDICTION.

The judgment of the United States Court of Appeals for the First Circuit was entered on October 9, 1997, and rehearing was denied on December 8, 1997. App. A-1; C-1. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). The First Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). Section 2403(a) of 28 U.S.C. may apply, and the notification required by Supreme Court Rule 29.4(b) has been made.

STATUTORY PROVISIONS INVOLVED.

U.S. CONSTITUTION AMENDMENT X

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

16 U.S.C. § 1532(19)(1986).

The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

16 U.S.C. § 1538(a)(1).

Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United Staters to --

. . . . .

(B) take any such species within the United States or the territorial sea of the United States[.]

16 U.S.C. § 1539(a)(1).

The Secretary, may permit, under such terms and conditions as he shall prescribe --

. . . . .

(B) any taking otherwise prohibited by section 9(a)(1)(B) [16 U.S.C. § 1638(a)(1)(B)] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

50 CFR § 17.3 (1994).

Harm in the definition of 'take' in the Act means an act which actually kills or injures

> wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

STATEMENT OF THE CASE.

1. Procedural History.

Richard Max Strahan ("Strahan") originally filed suit on April 21, 1995, and sought a preliminary injunction: (1) ordering agencies of the Commonwealth of Massachusetts ("Commonwealth") to revoke all previously issued licenses and permits authorizing gill net and lobster pot fishing; and (2) barring the Commonwealth from issuing any such licenses and permits in the future unless it received incidental take and small take permits from the National Marine Fisheries Service ("NMFS") under the ESA and Marine Mammal Protection Act ("MMPA"). App. B-4 to 5.[1] The District Court had

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[1] As later amended, the Complaint contains four counts. App. B-4 n.7. Count I claims that the Commonwealth violates Section 9 of the ESA because its "licensing and regulation of fishing gear in Massachusetts coastal waters allegedly results in incidental takings of Northern Right whales without a permit." *Id.* Count II claims that the Commonwealth's "licensing of gillnets and lobster gear in the NMFS-designated critical habitat of Massachusetts Bay is an impermissible modification of that habitat." *Id.* Count III claims that the Commonwealth violates Section 103 of the MMPA because its licensing and regulation

jurisdiction over this case pursuant to 28 U.S.C. § 1331. The Conservation Law Foundation ("CLF") has participated in briefing and oral argument as amicus curiae in the District Court and the Court of Appeals at all significant phases of this litigation, supporting what it views as "an attempt to force officials of the Commonwealth of Massachusetts to adopt measures to protect several types of whales," including right whales. 1st Cir. Appendix ("R.A.") 179.

On September 24, 1996, over the defendants' objection, the District Court entered a preliminary injunction, "with a view toward developing additional protective measures" for the Northern Right Whale and other endangered whales. App. B-69 to 74. The Court ordered the defendants to: (1) "apply for an incidental take permit from NMFS [under the ESA] on or before October 18, 1996, . . . for Northern Right whales"; (2) "apply for a [small take] permit under the [MMPA] on or before October 18, 1996, . . . for Northern Right whales"; (3) "submi[t] to the court on or before December 16, 1996, [a plan] to restrict, modify or eliminate the use of fixed-fishing gear in coastal waters[2] of Massachusetts listed as critical habitat for

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of fishing gear in Massachusetts coastal waters "allegedly results in the entanglement of Northern Right whales in fishing gear." *Id.* Count IV claims that the Commonwealth authorizes whale-watching activities in violation of Section 9 of the ESA. *Id.*

[2] Massachusetts "coastal waters" are "all waters of the commonwealth within the rise and fall of the tide and the marine limits of the jurisdiction of the commonwealth," Mass. Gen. Laws c. 130, § 1, and within "three geographical miles from the

Northern Right whales"; and (4) "convene an Endangered Whale Working Group to engage in substantive discussions with the plaintiff, or his representative, as well as with other interested parties, regarding modifications of fixed-fishing gear and other measures to minimize harm to the Northern Right whales." *Id.* The District Court declined to enjoin the Commonwealth's licensure of gill net and lobster pot fishing.

On October 1, 1996, the defendants appealed from the District Court's preliminary injunction. R.A. 249-52.[3]

In October, 1996, the defendants applied for permits from NMFS under the ESA and MMPA for the incidental take of Northern Right Whales in Massachusetts coastal waters and nominated members to the District Court's Endangered Whale Working Group pursuant to par. 4 of the District Court's preliminary injunction. R.A. 274-75. On October 29, 1996, the District Court entered an order designating the members of the Working Group. R.A. 293A-B.

On November 4, 1996, Strahan moved for contempt against the defendants contending that their October 17, 1996 incidental take application to NMFS was a "sham" and violated paragraphs 1 and 2 of the District Court's preliminary injunction. R.A.

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shoreline." 322 Code Mass. Regs. § 8.02. No one may engage in commercial fishing activities in Massachusetts coastal waters unless they are licensed by the Commonwealth's Division of Marine Fisheries. R.A. 32-50.

[3] Strahan also appealed from the preliminary injunction on October 18, 1996. R.A. 19.

298-314. [4]

The District Court's Working Group met in November and December, 1996. R.A. 362-404. As a result of the Working Group's meetings, the defendants, on December 16, 1996, submitted a plan to the District Court pursuant to par. 3 of the District Court's preliminary injunction. The District Court did not enter further orders, but retained oversight authority over the Commonwealth's regulatory efforts and measures.

After all parties filed notices of appeal from the September 24, 1996 preliminary injunction ruling, the Court of Appeals for the First Circuit issued a decision on October 9, 1997, affirming the District Court in relevant part. *See* App. A. The Court of Appeals agreed with the District Court "that a governmental

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[4] On November 29, 1996, NMFS issued a notice acknowledging its receipt of the Commonwealth's October 17, 1996 incidental and small take permit application and inviting public comment on the application. R.A. 340-61; 61 Fed. Reg. 64500 (December 5, 1996). In doing so, NMFS restated its earlier policy statement of May 28, 1996 that "it was unnecessary and inappropriate for Massachusetts to apply" for such permits, but invited public comments on its position. 61 Fed. Reg. at 64503. No comments were received during the public comment period, which ended on January 6, 1997. 61 Fed. Reg. at 64501; 62 Fed. Reg. 5385, 5386 (February 5, 1997).

On January 28, 1997, NMFS reaffirmed its policy statement, *See* 1st Cir. Supplemental Record Appendix ("SRA") 1-2, and made that statement final on February 5, 1997, *see* 62 Fed. Reg. at 5385-86. NMFS restated its policy position again on April 8, 1997. *See* 62 Fed. Reg. 16789 (April 8, 1997).

third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA." App. A-16, citing, *inter alia*, *Palila v. Hawaii Dept. of Land and Nat. Resources*, 639 F.2d 495, 497-98 (9th Cir. 1981)("*Palila I*"). It rejected the defendants' argument that their regulatory scheme did not proximately cause private actors to violate the ESA, holding that the "causation here while indirect, is not so removed that it extends outside the realm of causation as it is understood in the common law." App. A-17 to 18. It likewise disagreed with the defendants' position that it should defer to NMFS or recognize that additional regulation, if mandated by the ESA, should come from NMFS. App. A-18 to 19. Finally, it rejected the defendants' factual arguments, because, among other things, the "evidence of the significant efforts made by the Commonwealth to 'minimize Northern Right Whale entanglements in fishing gear' . . . [is] irrelevant" as long as there was evidence of whale entanglements and of at least "a single injury to one whale." App. A-21 to 22.[5]

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[5] The decision below states that "it is not possible for a licensed commercial fishing operation to use its gillnets or lobster pots in the manner permitted by the Commonwealth without risk of violating the ESA by exacting a taking." App. A-17. The District Court did not make this assertion, and there is no support in the record for it. On the contrary, the lower court found (and the First Circuit affirmed) "that the Commonwealth's probable violation of the ESA could be curtailed without such extreme measures" as halting fixed gear fishing. App. A-37. Consistent with this conclusion, the panel upheld the lower Court's finding that "northern right whales are

Viewing the defendants' Tenth Amendment arguments as relating primarily to remedy, the Court rejected an analogy to *New York* and *Printz* because it believed that two distinguishing facts existed. First, it believed that there was a statutory violation in this case, unlike in the other two cases. App. A-26 to 27, 32 to 33, citing, *inter alia*, *Palila v. Hawaii Dept. Of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988)("*Palila II*"). Second, the States in those cases were directed "to take positive action with respect to a particular field" while, here, the defendants were directed "to find a means of bringing the Commonwealth's scheme into compliance with federal law." App. A-33. It also argued that the Commonwealth could be put to a choice of regulating according to ESA standards or having its regulations preempted by the ESA and regulations. *Id.*

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rarely seen in Cape Cod Bay after May 15." App. A-37, affirming 939 F. Supp. at 968. *Cf.* App. A-5 (NMFS proposes banning fixed gear in the Cape Cod Bay Critical habitat only from January 1 to May 15 and in the Great South Channel only from April 1 to June 30 of each year).

2. *FACTS.*

A. *Federal Enforcement of the ESA off the Massachusetts Coast.*

The United States Secretary of Commerce (the "Secretary"), through NMFS, is responsible for enforcing the ESA with respect to endangered species of marine mammals. *Incidental Take of Endangered, Threatened and Other Depleted Marine Mammals*, 54 Fed. Reg. 40,338 (1989); *see also* 16 U.S.C. § 1362(12); App. B-18 The ESA authorizes NMFS to promulgate regulations designating critical habitats of endangered species. 16 U.S.C. § 1533(a)(3).

On June 3, 1994, NMFS designated portions of Cape Cod Bay as a critical habitat for the Northern Right Whale. 59 Fed. Reg. 28,793, 28,797-8 (1994). Portions of Massachusetts coastal waters are located in Cape Cod Bay. R.A. 184A. The designation, however, banned neither whale watching, nor commercial fishing activities in the area, nor the use of gill nets or other fishing gear. 59 Fed. Reg. 28,798-804 (1994).

> [The critical habitat] designation contains no land use or fishing regulations, and will not directly affect private activities . . . If, in the future, NMFS determines that restrictions on human activities are necessary to protect northern right whales or their habitat, such action would be preceded by an opportunity for public review and comment.

59 Fed. Reg. 28,804.

Notwithstanding the ESA's prohibitions, NMFS "may

permit . . . any taking otherwise prohibited by [the ESA] if such taking is incidental to, and not for the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(1)(B).[6] Currently, NMFS has no regulations requiring the Commonwealth to apply for an incidental take permit prior to licensing any type of commercial fishing in its coastal waters. On May 28, 1996, NMFS advised the Commonwealth that:

> when appropriate, [NMFS] will issue incidental take authority for commercial fishing operations to individual fishermen . . . [I]t is inappropriate and unnecessary for the Commonwealth to apply for [such] a permit.

R.A. 205-6.[7] It also advised the Commonwealth that "it does not anticipate issuing any incidental take [permits] . . . with respect to right whales." *Id.*[8]

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[6] NMFS may also issue "small take" permits under the MMPA that authorize "the incidental taking . . . of marine mammals in the course of commercial fishing operations." 16 U.S.C. § 1374(a).

[7] *See* above, p. 7 n. 4.

[8] In August, 1995, NMFS published a notice in the Federal Register that it would not issue incidental take permits for Northern Right whales because it could not find that incidental takings of these whales would have a negligible impact on their survival. *Taking of Threatened or Endangered Marine Mammals Incidental to Commercial Fishing Operations; Interim Permit*, 60 Fed. Reg. 45399

B. *Massachusetts' Protective Regulatory Measures.*

Massachusetts has long made it illegal to take any federally listed endangered species. Mass. Gen. Law c. 131A, § 2, added by Mass. St. 1990, c. 408, § 4. Northern Right Whales are listed as endangered species under state marine fisheries law. 321 Code of Mass. Regs. § 10.60. *See* R.A. 143.

In addition, the Commonwealth has a long history of regulatory measures designed to protect the Northern Right Whale. R.A. 144-49, 184-184A. NMFS' critical habitat designation "recognizes and appreciates the efforts of the Commonwealth of Massachusetts to protect the Northern Right Whale." 59 Fed. Reg. 28,793, 28,801 (1994).

The Commonwealth's measures to protect Northern Right Whales include: (1) establishment of a 500 yard buffer zone between Right Whales and fishing vessels;[9] (2) distribution of educational information to licensed commercial fishermen and

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(August 31, 1995). NMFS repeated its position on November 29, 1996. R.A. 350.

[9] *See* 322 Code of Mass. Regs. § 12.01-12.05 (1993). There was no federal buffer zone for whales at the time Massachusetts adopted this measure. R.A. 36-7. On December 27, 1994, NMFS proposed adopting a 500 yard "protection zone" around every Northern Right Whale and a 100 yard "protection zone" around other whales. 59 Fed. Reg. 66,513, 66,514 (1994). NMFS has now adopted the proposal as a regulation. *See North Atlantic Northern Right Whale Protection; Interim Final Rule*, 62 Fed. Reg. 21562 (April 25, 1997)

owners of Massachusetts registered boats on the importance of identifying, avoiding, and reporting entanglements of Northern Right Whales; (3) requesting agencies with jurisdiction over ocean dumping activities to recognize the impacts of such activities on Northern Right Whales in identified high use areas within Cape Cod Bay; and (4) encouraging and supporting NMFS' designation of the Cape Cod Bay critical habitat in 1994. R.A. 145-46, 184-84A.

The Commonwealth has specifically limited the potential for Right Whale entanglements in fishing gear. R.A. 147, 184-84A. In 1992, the Department adopted regulations that prohibited the use of more than 800 pots by coastal lobster pot fishermen at a given time. *See* 322 Code Mass. Regs. § 6.13(2). In the same year, the Department also imposed a moratorium on the issuance of new sink gill net regulated fishery permits. *See* 322 Code Mass. Regs. § 8.10(4).

The Commonwealth also established a moratorium on the issuance of new coastal lobster fishing permits, *See* 322 Code Mass. Regs. § 6.13(2), and banned the use of sink gill nets in all Massachusetts coastal waters: (a) south of Boston during the month of March, when whales usually migrate to the area to feed; (b) north of Cape Ann during the month of November; and (c) south of Cape Cod from April to November 15. *See* 322 Code Mass. Regs. § 4.08(2). In March, 1996, it initiated a program of weekly surveillance flights over the Cape Cod Bay critical habitat, with the assistance of the United States Coast Guard's Air Wing at Otis Air Force Base, from January to April of each year for the purpose of spotting Northern Right Whales and Northern Right Whale entanglements in fishing gear, and reporting such sightings to the Center for Coastal

Studies. R.A. 146-47. The Department is also formulating plans to circulate information on Northern Right Whale sightings to all Massachusetts Harbor Masters and ultimately to fixed gear fishermen, through a joint program with NMFS. *Id.*

In January, 1997, in response to the District Court's preliminary injunction, the Commonwealth adopted additional regulations. In a related case brought by the same plaintiff against NMFS and the Coast Guard, the same District Judge stated that "the Commonwealth needed some encouragement to develop its policies in this area under the ESA" and claimed credit for the Commonwealth's new regulatory measures, which he stated were adopted "under prodding from this Court." *Strahan v. Linnon*, 967 F. Supp. 581, 606 (D. Mass. 1997). The 1997 Massachusetts regulations (1) banned all gill net fishing in all Massachusetts coastal waters listed as critical habitat for Northern Right Whales from January 1 through May 15 of each year, the period when Northern Right Whales are usually present in the area; and (2) limited lobster pot fishing in the area during the same time period to individuals deploying "break away" gear or other similar gear designed to allow a Northern Right Whale to break free from lobster pot fishing gear with relative ease. R.A. 362-69, 405-7.[10] In May, 1997,

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[10] NMFS followed the Commonwealth's lead on April 1, 1997, by issuing a rule closing Federal waters to vessels fishing with sink gillnet gear and other gillnet gear in Cape Cod Bay from March 27 to May 15, 1997, and from January 1 to May 15 in subsequent years. 62 Fed. Reg. 15425, 15426 (April 1, 1997). On April 4, 1997, NMFS issued an emergency interim rule implementing restrictions on the use of lobster pot gear in the

the Commonwealth adopted a surveillance-based management plan for Northern Right Whales and adopted a policy pursuant to which the Commonwealth's EOEA Secretary would issue an annual report by October 15th of each year: (1) analyzing the effectiveness of Commonwealth's regulatory measures designed to protect Northern Right Whales; and (2) proposing any regulatory changes. R.A. 411-12.

The "Defendants do not place gill nets and lobster gear in [Massachusetts] coastal waters." App. B-39.

ARGUMENT.

The First Circuit's decision in this case conflicts with this Court's decisions in *New York v. United States*, 505 U.S. 144 (1992); and *Printz v. United States*, 117 S.Ct. 2365 (1997). In particular, the First Circuit has violated the principle that "The Federal Government may not compel the States to enact or administer a federal regulatory program." *New York*, 505 U.S. at 188. The ruling in this case is particularly egregious, because it seeks to compel Massachusetts to work toward enacting additional regulatory measures that NMFS, the responsible federal agency, had declined to enact. This ruling also raises issues of national importance regarding the roles of the States and all three branches of the Federal Government, including the question whether the Federal Courts may impose affirmative regulatory obligations, not upon federal executive

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Cape Cod Bay Right Whale critical habitat from April 1 to May 15, 1997. 62 Fed. Reg. 16108 (April 4, 1997).

agencies, but upon the States, based solely upon alleged shortcomings in state regulation, when compared with the ESA.

The First Circuit's decision also goes well beyond notions of proximate causation inherent in the federal ESA and its regulations. *See Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 696 n.9, 700 n.13, 709-714 (1995); 50 C.F.R. § 17.3. While the majority in *Sweet Home* did not reach the issue, it appears that at least four Justices have rejected the broad proximate causation theory embraced by the Circuit Court. *See* 515 U.S. at 709-714 (O'Connor, J., concurring)(questioning *Palila II*); 515 U.S. at 714-36 (Scalia, J., dissenting, joined by Rehnquist, C.J. and Thomas, J.).

Accordingly, the Court should grant certiorari to review the First Circuit's decision. Despite the interlocutory nature of the ruling below, this case presents several "important and clear-cut issue[s] of law that [are] fundamental to the future conduct of the case. . . ." Stern & Gressman, *Supreme Court Practice*, § 4.18, p. 196 (7th ed. 1993) and cases cited.

A. *The Decision Below Conflicts with New York and Printz by Construing a Federal Statute to Require Additional State Regulatory Measures.*

The defendants here have done nothing more than exercise state licensing and regulatory power over private economic activity. There is no allegation that any aspect of their regulations has placed endangered whales in greater jeopardy than they would be without state regulation. Indeed, as demonstrated at length above, the defendants have expressly

prohibited takings of endangered species and have enacted regulations to protect whales. If they had done nothing, and thereby left fixed gear fishing unregulated at the state level, they would not be liable under the ESA. App. B-41. Their only alleged omissions consist in declining to take *additional* state regulatory measures.[11] Nevertheless, holding that Massachusetts' "efforts to minimize [whale] entanglements are irrelevant" (App. A-22) as long as any risk of taking existed, the First Circuit found that "the Commonwealth's regulation of commercial fishing" violates the ESA. On this view, Congress has made the States insurers against private ESA violations.

A federal obligation requiring a State to regulate to eliminate all risk of private ESA violations cannot be grounds for liability under the Act; otherwise, the ESA would violate the States' reserved authority under constitutional principles of federalism, including the Tenth Amendment to the United States Constitution. *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 117 S. Ct. 2365 (1997). In *New York*, this Court invalidated a federal statute requiring states to regulate further or to take title to low level radioactive waste, because "The Federal Government may not compel the States to enact or administer a federal regulatory program." 505 U.S. at 188. *Accord*, *Acorn v. Edwards*, 81 F.3d 1387 (5th Cir. 1996), *cert. denied sub. nom. Acorn v. Foster*, 117 S. Ct. 2532

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[11] Without judicial ability to impose such measures, Article III standing would not exist here, because the Court would not be able to redress alleged injury to whales. App. B-39 (alleged violation is "redressable" "[i]f the Defendants were to limit further or ban . . . the use of gillnets and lobster gear").

(1997). In *Printz*, the Court struck down provisions of a statute that imposed obligations upon local officials to take certain actions holding that "Congress may not circumvent [the] prohibition [of *New York*] by conscripting the State's officers directly." 117 S. Ct. at 2379.

The fundamental conflict between the decision below and *New York* and *Printz* lies in the lower court's attempt to justify federal control over state regulatory choices by characterizing *failure to regulate* at the state level as a continuing federal violation. The lower federal courts must not be permitted to circumvent *New York* and *Printz* in this manner.

To be sure, the First Circuit did try to justify its departure from *New York* and *Printz*. Its rationales must be rejected as inconsistent with those decisions, however, because ultimately the Court found liability only due to the supposed absence of enough state regulations to achieve the ESA's goals.[12]

The Circuit Court first attempted to avoid the rule of *New York* and *Printz* by characterizing the State's regulatory activity here as a "continuing violation." App. A-26 to 27, 31 to 33.

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[12] This conclusion also follows from process of elimination. The prohibition of state licensure and regulation cannot be the ESA's goal, because it would fail to "redress" the alleged harm, and would, instead, cause greater jeopardy to endangered species. The panel (App. A-18 n.3) expressly disclaimed premising liability upon a theory that gillnets and lobster pots must be banned by the State in areas where the federal administering agency has chosen not to ban them. The only remaining alternative is that the State is being held liable for not regulating enough.

That characterization itself contravenes this Court's decisions. In *Printz* itself, for instance, Congress had attempted to make it a federal criminal "violat[ion]" for a Sheriff to refuse to conduct a background check in connection with sales of handguns. *See* 117 S. Ct. at 2369, citing 18 U.S.C. § 924(a)(5). The question was whether Congress could do so, and this Court squarely held that it could not. In *New York* itself, the State would have been in violation of a congressional act by 1996 if it refused "to administer the federal program." 505 U.S. at 177. Neither *New York* nor *Printz* makes the circular assertion, which the First Circuit did, that a state is "in violation of a congressional act" without deciding whether the relevant feature of the federal act is constitutional.

The Circuit Court's second ground for distinguishing *New York* and *Acorn* (App. A-33) is that the "states in those cases were directed to take positive action with respect to a particular field." This distinction, too, fails. Here, as shown above, the defendants are being held liable for taking some, but not enough licensing and regulatory measures with respect to a particular field, namely the protection of federal endangered species. It is true that the requirement in this case for more regulation does not explicitly appear in so many words in the Act or the opinion below, but the panel has now construed the ESA to contain such a requirement as a matter of congressional mandate upon state licensing and regulatory authorities. This construction, falls squarely within the proscription against requirements to "regulat[e] according to the instructions of Congress." *New*

York, 505 U.S. at 175.[13]

In truth, Congress meant for NMFS to decide whether additional regulation was necessary. NMFS's view, which the lower courts have ignored, is that because the Commonwealth's role is regulatory it is "inappropriate and unnecessary" for it even to apply for an incidental take permit. *See* above, p. 7, n.4. *See Sweet Home*, 515 U.S. at 703 (Deference to federal agency administering the ESA). Congress intended any such regulation to originate from the Federal executive branch, not the judiciary through orders to state agencies. The correct construction of the ESA, which avoids constitutional conflict with *New York* and *Printz* (see *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council,* 485 U.S. 568, 575 (1988)), is that state regulators are not liable when some risk exists that the acts of private licensees may violate federal law.

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[13] The lower court cannot excuse an unconstitutional basis for imposition of liability on the State on the ground that there is, as yet, no specific judicial order for regulatory action. Since *liability* here was predicated upon failure to regulate enough, the situation here closely resembles *New York* itself, where the State challenged its liability under the federal act in a declaratory judgment action, in which no relief at all had entered against the State. Nor had relief entered against the states in *Printz* or *Acorn*.

B. *The Panel's "State Authorization" Theory Raises Issues of National Importance and Conflicts with New York and Printz.*

The Circuit Court's opinion relies heavily upon the theory that a State authorizes and may therefore be held liable for illegal activity by issuing a license to private citizens to engage in a use of fishing gear that can result in whale entanglements. It characterizes the State as "a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species . . . ." App. A-16. This conception of state authorization raises fundamental questions regarding the role of the States, as regulators, in relation to private individuals' independent obligations to comply with federal law. It also raises basic issues regarding the nature of our political systems and freedoms. The First Circuit's "state authorization" theory calls out for review by this Court in order to address an issue of national importance and correct a further conflict with *New York* and *Printz*.

If States, through their historic licensing and regulatory powers, become federally liable for "authorizing" private violations of Federal law, then numerous troubling consequences may follow. Many state licensing functions could be pressed into federal service by the Courts, with the goal of inducing additional state regulations that the responsible federal agencies have eschewed, as in this case. For instance, the First Circuit's rule would call into question the common sense understanding that state licensure of firearms, including hunting rifles, does not authorize or cause the taking of endangered land species, even though most hunters would not kill an endangered

species "but-for" the State's firearms license.[14] Similarly, the State does not authorize Medicare fraud by licensing physicians and other health professionals to practice, even though these professionals usually would need such a license in order to make their fraud effective. Nor does a State authorize violations of federal environmental laws by licensing hazardous waste cleanup professionals some of whom may end up violating those laws. In each case, the State is entitled to rely upon the responsibility of the individuals it licenses to comply with federal laws.

In order to avoid such dislocations of federal and state control, the law, including most prominently, *New York* and *Printz* has rejected the First Circuit's theory.[15] There are many defects in the decision below on this point.

First, as a matter of law and fact, the Commonwealth does

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[14] Even the First Circuit recognized, however, that a states' Registry of Motor Vehicles cannot be held liable for private use of registered automobiles to commit federal crimes. App. A-16 to 17. The Circuit Court's attempt to distinguish the Registry situation misses the crucial point that the only manner in which the state has licensed fishing nets and pots is in a manner that seeks to *avoid* taking whales.

[15] It is therefore unnecessary to solve the puzzle of how NMFS "expressly declined to ban gillnet or lobster pot fishing in Cape Cod Bay" without making "a policy determination . . . that such a ban is unnecessary." App. A-19. It is certainly not the case that, if such a ban is necessary, it must be imposed by the State, in preference to federal regulation.

not grant "authority" to fish in a manner that takes endangered species.[16] On the contrary, it has *prohibited* fishermen from taking any endangered species "listed under the Federal Endangered Species Act." Mass. Gen. Laws c. 131A, § 2. The Commonwealth has taken many other regulatory measures to protect whales. 322 C.M.R. 12.00-12.05 (1993). *See* above at 12-15; App. A-6 to 7. The Commonwealth's regulatory process thus *restricts* the liberty to engage in unrestrained fishing and *prohibits* the taking of right whales. The Commonwealth cannot be said to authorize what it expressly prohibits and tries to prevent.[17]

The state authorization theory, moreover, seems to assume that no one would be allowed to fish unless the state government affirmatively authorized it. This is wrong as a matter of basic constitutional theory. In our free society, citizens may act as they wish, unless their acts are validly prohibited.[18] Where

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[16] The Massachusetts Endangered Species Act defines "take" to include acts that "harass, harm, . . . kill, trap," etc., just like the Federal Endangered Species Act. Mass. Gen. Laws c. 131A, § 1.

[17] Using the concept of "state authorization" in this way contravenes the federalist presumption that States as States do not authorize violations of law--the very presumption upon which depends the fiction of *Ex Parte Young*, 209 U.S. 123, 159 (1908), cited and applied by the Circuit Court at App. A-23 to 24, and thus the authority of the Federal Court to issue *any* injunction orders against *any* state officials.

[18] See e.g. U.S. Const., 9th and 10th Amendments; The Declaration of Independence (all citizens possess "certain

federal obligations are concerned, individuals owe responsibility directly to the federal government. *New York*, 505 U.S. at 165-66. Consistent with this conception of federalism and of individual freedom, the States must be free to license private activity and rely upon the private actors to comply with federal law.

To hold that the State's licensure of private activity (particularly with the safeguards described above) has authorized federal violations and thereby subjected the Commonwealth to court supervision of its licensing and regulatory processes is to enlist the States in an intermediate role between citizens and their federal government. *New York* irreconcilably conflicts with the Circuit Court's approach on this point. 505 U.S. at 163, 168-69, 176, 188. *See also The Federalist Papers* Nos. 15, 21 (Hamilton).[19]

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unalienable Rights"). The First Circuit's contrary assumption harks back to the now-rejected fiction that the King (now the Commonwealth) owns all the free-swimming fish in its territorial waters, but that fiction has now been replaced by the acknowledgment that the Commonwealth's power is not proprietary, but regulatory. *Toomer v. Witsell*, 334 U.S. 385 (1948).

[19] The First Circuit's attempt to rely upon preemption principles (App. A-25 to 28) founders at the outset, because the ESA does not purport to preempt state regulations that leave some risk of private ESA violations. Compare *FERC v. Mississippi*, 456 U.S. 742, 764 (1982)(statute conditioning state regulation "in a pre-emptible field upon the consideration of federal proposals."). Moreover, the lower courts could not

C. *The Panel's "Common Law Causation" Theory Conflicts with Sweet Home, as well as New York and Printz.*

The lower court also purports to rely upon common law causation principles (App. A-15 to 17). Its theory not only is a novel construction of proximate cause under the ESA but also conflicts with *Babbitt v. Sweet Home Chapter of Community for a Great Oregon*, 515 U.S. 687 (1995), particularly as understood by Justice O'Connor in her concurrence. 515 U.S. at 712 (ESA incorporates common law principles of causation). "After *Sweet Home*, the proximate cause of any 'take' would be the permittee who modified the habitat, not the public official who only granted a permit." Quarles, "*Sweet Home* and the Narrowing of Wildlife 'Take' Under Section 9 of the Endangered Species Act", 26 ELR 10003, 10013 (January, 1996). *See also Pyramid Lake Paiute Tribe v. Department of the Navy*, 898 F.2d 1410, 1419-20 (9th Cir. 1990); *National Wildlife Federation v. National Park Service*, 669 F. Supp. 384, 392 (D. Wyo. 1987)(National Park Service not liable for potential takings caused by private campers disobeying the agency's rules).

The First Circuit's decision notes that the District Court found that "but for the permitting process," whale takings

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have had preemption in mind when they ordered measures aimed at additional regulation, because preemption simply precludes "enforce[ment]" of state law. *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941). See *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494, 497 (1987).

"could not take place." App. A-15. Under but-for causation, large numbers of people are potentially liable for whale entanglements in fishing gear, including anyone upon whom fishing depends -- such as the sellers of fixed gear, boat builders, fuel dealers, purveyors of food to the ships' crews, lighthouse keepers, and numerous others. However, "but-for" causation does not establish causation under the common law. *Sweet Home*, 515 U.S. at 713 (O'Connor, J., concurring) ("Proximate causation depends to a great extent on considerations of the fairness of imposing liability for remote consequences."); *King v. Pace*, 575 F. Supp. 1385 (D. Mass. 1983) (holding that Commonwealth's liquor licensing agency was not liable in a wrongful death suit under 42 U.S.C. § 1983); Restatement of Torts, Second, § 431 and comment a. If it were otherwise, then the seminal case of *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), would have come out the other way. Nor does but-for causation suffice under other statutes, such as Title VII of the Civil Rights Act of 1964.[20]

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[20] Title VII achieves this result through its definition of "employer," which effectively excludes States in their regulatory capacity. *See Haddock v. Board of Dental Examiners of California*, 777 F.2d 462, 463 (9th Cir. 1985)(state board of dental examiners); *Tyler v. Vickery*, 517 F.2d 1089, 1096 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976)(state board of bar examiners); *George v. New Jersey Board of Veterinary Medical Examiners*, 635 F. Supp. 953, 956 (D.N.J. 1985), aff'd 794 F.2d 113 (3d Cir. 1986)(state board of veterinary examiners); *Woodward v. Virginia Board of Bar Examiners*, 420 F. Supp. 211, 214 (E.D. Va. 1976), aff'd 598

In addition, there is not even "but-for" causation in this case. If there were no Departmental permitting process here, then unfettered fishing would take place, and whale takings would be far more likely than they are today. The Commonwealth's current licensure and regulatory actions have placed endangered whales in a far more protected position than they would be absent state intervention. To ignore the totality of the Commonwealth's restrictions on fishing and to look only at the fact that a number of licensed individuals may fish in accordance with regulations, is akin to blaming the good Samaritan for the consequences of intervening (or for intervening unsuccessfully) to prevent harm, without considering either the benefit given or the gratuitous nature of the Samaritan's actions. The common law resoundingly rejects that approach. E.g. *Osterlind v. Hill*, 263 Mass. 73, 76; 160 N.E. 301 (1928).[21]

F.2d 1345 (4th Cir. 1979) (state board of bar examiners).

[21] The only ESA cases that the First Circuit cites (elsewhere in the opinion -- at App. A-15, 26 to 27) deal not with common law principles applied to state regulatory agencies, but with States acting in a proprietary capacity (i.e. maintaining particular animals in a sensitive habitat), *Palila I*, 639 F.2d at 497-98; *Palila II*, 852 F.2d at 1110); or with governmental entities not entitled to 10th Amendment protection (i.e. federal agencies or local agencies, *Sierra Club v. Yeutter*, 926 F.2d 429, 438-39 (5th Cir. 1991)(U.S. Forest Service); *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1301 (8th Cir. 1989); *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180-81 (M.D. Fla. 1995)). These cases follow

Finally, state regulations do not relieve private actors of a duty to meet a higher standard of conduct. Under common law rules, private defendants may have an obligation to exercise greater care than simply complying with state and federal regulations. *See Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652, 658 (1st Cir. 1981); *MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, 139, 475 N.E. 2d 65, *cert. denied*, 474 U.S. 920 (1985), and cases cited. State regulators cannot be the proximate cause of harm under *Sweet Home* where they leave intact (and even replicate in state law) the federal duty of private actors to comply with the ESA.

In short, the Commonwealth has not increased the risk of harm to whales. Instead of doing nothing, the Commonwealth has in fact decreased that risk by regulation. Even if it has not decreased the risk of harm by private parties to zero, the common law has not, to defendants' knowledge, ever deemed state regulators to be the proximate cause of alleged harm simply because the regulators have left it up to private parties to conform their activities to federal law, such as the ESA.

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doubtful legal concepts, in light of *Sweet Home*.

Conclusion.

For the foregoing reasons, the Court should issue a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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Date: March 6, 1998

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Supreme Court, U.S.
FILED
971485 MAR 6 1998
OFFICE OF THE CLERK

NO. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM 1997

PHILIP COATES, DIRECTOR OF THE MASSACHUSETTS DIVISION OF MARINE FISHERIES, ET AL.,
Petitioners,

v.

RICHARD MAX STRAHAN,
Respondent.

PETITION FOR A WIRT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Richard Max Strahan v. Trudy Coxe, Secretary of Massachusetts Executive Office of Environmental Affairs; John Phillips, Commissioner, Massachusetts Department of Fisheries, Wildlife, and Environmental Law Enforcement, Philip Coates, Director, Massachusetts Division of Marine Fisheries,
U.S. District Court (D. Mass.)
Sept. 24, 1996
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Appendix C

Richard Max Strahan v. Trudy Coxe, Secretary of Massachusetts Executive Office of Environmental Affairs, et al.,
1st Cir. App. Dec. 8, 1997

APPENDIX A

Richard Max STRAHAN, Plaintiff-Appellee,

v.

Trudy COXE, Secretary of Massachusetts Executive Office of Environmental Affairs, et al., Defendants-Appellants.

Richard Max STRAHAN, Plaintiff-Appellant,

v.

Trudy COXE, Secretary of Massachusetts Executive Office of Environmental Affairs, et al., Defendants-Appellees.

No. 96-2063.

United States Court of Appeals,
First Circuit.
Heard June 4, 1997.
Decided Oct. 9, 1997.
[reported at 127 F.3d 155 (1st Cir. 1997)]

Before TORRUELLA, Chief Judge, CAMPBELL, Senior Circuit Judge, and BOUDIN, Circuit Judge.

TORRUELLA, Chief Judge.

In April 1995, Richard Strahan ("Strahan") filed suit against Trudy Coxe, Secretary of the Massachusetts Executive Office of Environmental Affairs, John Phillips, Commissioner of the

Massachusetts Department of Fisheries, Wildlife, and Environmental Law Enforcement, and Philip Coates, Director of the Massachusetts Division of Marine Fisheries (together "defendants"), claiming that these Massachusetts state officers were violating the federal Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq., and the Marine Mammals Protection Act ("MMPA"), 16 U.S.C. § 1361 et seq. Strahan sought a preliminary injunction ordering the Commonwealth to revoke licenses and permits it had issued authorizing gillnet and lobster pot fishing and barring the Commonwealth from issuing such licenses and permits in the future unless it received "incidental take" and "small take" permits from the National Marine Fisheries Service ("NMFS") under the ESA and MMPA. Defendants moved to dismiss Strahan's complaint and, in the alternative, for summary judgment.

On September 24, 1996, the district court: (1) denied defendants' motion for summary judgment on Strahan's ESA claims; (2) dismissed Strahan's MMPA claims; and (3) granted summary judgment on Strahan's ESA claims in Count IV of Strahan's amended complaint. *Strahan v. Coxe*, 939 F.Supp. 963 (D.Mass.1996). In this ruling, the district court declined to grant the preliminary injunctive measures sought by Strahan. Instead, the court issued a preliminary injunction ordering defendants to: (1) "apply for an incidental take permit [under the ESA] from NMFS ... for Northern Right whales"; (2) "apply for a permit under the [MMPA] for Northern Right whales"; (3) "develop and prepare a proposal ... to restrict, modify or eliminate the use of fixed- fishing gear in coastal waters of Massachusetts listed as critical habitat for Northern Right whales in order to minimize the likelihood additional

whales will actually be harmed by such gear"; and (4) "convene an Endangered Whale Working Group and to engage in substantive discussions with the Plaintiff [Strahan], or his representative, as well as with other interested parties, regarding modifications of fixed-fishing gear and other measures to minimize harm to the Northern Right whales." *Id.* at 990-91. Defendants appeal the district court's preliminary injunction order. Plaintiff Strahan cross-appeals the district court's: (1) refusal to grant him the precise injunctive relief sought; (2) dismissal of his MMPA claims; (3) alleged limitation on his right to discovery; and (4) alleged error in a factual ruling.[1] For the reasons stated herein, we vacate paragraph two of the injunction, requiring defendants to apply for a permit under the MMPA, and otherwise affirm the district court's opinion and order of injunctive relief.

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[1] We refer to Strahan's claims on appeal as "cross-appeals" even though they technically stem from a distinct, subsequent district court order refusing the pro se Strahan's request for a "supplementary" preliminary injunction. Strahan's claims all relate to the September 24, 1996 order, and, consistent with our obligation to construe pro se pleadings liberally, *see Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 595-96, 30 L.Ed.2d 652 (1972), we have consolidated these claims here.

BACKGROUND

I. STATUS OF THE NORTHERN RIGHT WHALE

Strahan is an officer of GreenWorld, Inc., an organization dedicated to the preservation and recovery of endangered species. *Strahan*, 939 F.Supp. at 966 & n. 6. Strahan brought suit on behalf of the Northern Right whale, listed as an endangered species by the federal government. *See* 50 C.F.R. § 222.23(a). Northern Right whales are the most endangered of the large whales, *Strahan*, 939 F.Supp. at 968, presently numbering around 300, 62 Fed. Reg. 39157, 39158 (1997). Entanglement with commercial fishing gear has been recognized as a major source of human-caused injury or death to the Northern Right whale. Final Recovery Plan for the Northern Right Whale (Eubalaena Glacialis), NMFS (December 1991)("Right Whale Recovery Plan") at 24; *see also Strahan*, 939 F.Supp. at 972. Collision with ships is also a significant cause of Northern Right whale death. *See* Right Whale Recovery Plan at 10; *Strahan*, 939 F.Supp. at 972.

The majority of Northern Right whales are present in Massachusetts waters only during spring feeding. *Strahan*, 939 F.Supp. at 968. The district court found, based on statements made by defendants as well as on affidavits from three scientists, that Northern Right whales have been entangled in fixed fishing gear in Massachusetts coastal waters at least nine times. *See Strahan*, 939 F.Supp. at 984 ("On May 15, 1983, a Right whale was observed 'thrashing around' a location three miles east of Manomet Point in Plymouth, MA because of its entanglement in ropes attached to lobster buoys.... Right

whales were also found entangled in lobster and other fishing gear in Massachusetts waters on June 16, 1978, May 13, 1982, October 14, 1985, May 15, 1983, August 29, 1986, August 7, 1993, November 17, 1994, and August 17, 1995. At least one of these whales was not expected to survive its injuries from the gear."). Moreover, a Northern Right whale mortality was reported off Cape Cod, Massachusetts in May 1996. 61 Fed. Reg. 41116, 41117 (Aug. 7, 1996).

The NMFS issued a final interim rule proposing to close off entirely the critical habitat of the Northern Right whale and to modify fishing practices to enhance the viability of the Northern Right whale. Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations, 62 Fed. Reg. 39157, 39158-39159 (July 22, 1997). The report accompanying the proposed rule recognized that entanglement with fishing gear is one of the leading causes of the depletion of the Northern Right whale population and indicated that more than half of the Northern Right whale population bear scars indicating unobserved and unrecorded earlier entanglement. *Id.* The report calls for a ban on gillnet fishing and lobster pot fishing, the two manners of fishing at issue in this case, during the Northern Right whales' high season in the Cape Cod Bay Critical Habitat from January 1 to May 15 of each year, and in the Great South Channel from April 1 to June 30, until modified fishing equipment is developed that will diminish the risk of injury and death to the Northern Right whale. *Id.* at 39159- 39160.

II. MASSACHUSETTS' REGULATORY AUTHORITY SCHEME

The Massachusetts Division of Marine Fisheries ("DMF") is vested with broad authority to regulate fishing in Massachusetts's coastal waters, Mass. Gen. L. c. 130, which extend three nautical miles from the shoreline, *see Strahan*, 939 F.Supp. at 974. Nearly all commercial fishing vessels must receive a permit from DMF in order to take fish, including shellfish, from Massachusetts coastal waters. 322 C.M.R. §§ 7.01-7.05, 8.08. DMF is a division of the Department of Fisheries, Wildlife and Environmental Law Enforcement, which is part of the Executive Office of Environmental Affairs. *Id.*; Mass. Gen. L. c 21A, §§ 2, 7, 8. The Division of Fisheries and Wildlife, a subcomponent of the Department of Fisheries, Wildlife and Environmental Law Enforcement, "has authority over all endangered species of Massachusetts including marine mammals." *Id.* (quoting Coates Aff. ¶ 3).

The DMF has limited the use of gillnets and lobster pot fishing gear in certain areas. *See id.* at 974-75; *see also* 322 C.M.R. § 4.09 (restricting use of gillnets south and west of Cape Cod), § 4.11 (restricting use of gillnets in Massachusetts Bay), § 4.13 (regulating fixed gear marking and maximum length requirements), § 6.13 (setting lobster trap limit), § 8.10 (fixed gear restrictions). "In 1994, in response to the alarming depletion of the Harbor porpoise, DMF ordered that all sink gillnets be removed from coastal waters north of Cape Ann every November and from Massachusetts Bay and Cape Cod Bay every March." 939 F.Supp. at 975 (citing DMF Rules Update (Nov. 2, 1994)).

In addition, the DMF has established a 500-yard "buffer zone" around Northern Right whales in Massachusetts coastal waters. 322 C.M.R. §§ 12.00-12.05 (1993). Defendant Coates admitted that he had "issued a limited number of scientific research permits to some whale watch vessels exempting them from the 500 yard buffer zone surrounding right whales for scientific research purposes upon application." Coates Aff. ¶ 11.

STANDARD OF REVIEW

In ruling on a motion for preliminary injunction, a district court is charged with considering: (1) the likelihood of success on the merits; (2) the potential for irreparable harm if the injunction is denied; (3) the balance of relevant impositions, i.e., the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest. *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 15 (1st Cir.1996). Under the ESA, however, the balancing and public interest prongs have been answered by Congress' determination that the "balance of hardships and the public interest tips heavily in favor of protected species." *National Wildlife Fed'n v. Burlington Northern R.R.*, 23 F.3d 1508, 1510 (9th Cir.1994). Our review of the district court's ruling on a motion for preliminary injunction is deferential and, "unless the appellant can show that the lower court misapprehended the law or committed a palpable abuse of discretion, the court of appeals will not intervene." *Ross-Simons of Warwick, Inc.*, 102 F.3d at

16.

DISCUSSION

I. MARINE MAMMAL PROTECTION ACT

Strahan contends on cross-appeal that the district court erred when it determined that he could not bring a citizen suit under the provisions of the Marine Mammal Protection Act. *See* 939 F.Supp. at 975. Defendants, on the other hand, argue that the district court, having properly found that it lacked jurisdiction under the MMPA, erroneously entered a remedy under the MMPA when it ordered the Commonwealth, in paragraph 2 of the preliminary injunction order, to apply for an incidental take permit pursuant to section 1387 of the MMPA and, in paragraph 4, to convene a working group similar to those initiated pursuant to the MMPA. *See id.* at 990-91. We find that the district court properly held that it lacked jurisdiction under the MMPA, and therefore its remedy in paragraph 2 based on the MMPA was erroneous. We find, however, that the remedy in paragraph 4 was not ordered pursuant to the MMPA, but instead was intended to be modelled on MMPA working groups and, therefore, was not erroneous.

The MMPA does not authorize citizen suits against a person alleged to be in violation of the Act. The Act states that, "[e]xcept as otherwise provided in this subchapter, the Secretary shall enforce the provisions of this subchapter." 16 U.S.C. § 1377. The district court properly recognized that the Act does not authorize the federal courts to enforce its provisions in the type of suit brought by Strahan. *See* 939 F.Supp. at 975. In

addition, the court properly found that the Administrative Procedure Act, 5 U.S.C. § 701 et seq., does not authorize suits against state officials. *See* 939 F.Supp. at 975. Based on these findings, the court correctly concluded that it did not have jurisdiction under the MMPA.

Seeking a contrary ruling, Strahan relies solely on *Kokechik Fishermen's Association v. Secretary of Commerce*, 839 F.2d 795, 802 (D.C.Cir.1988). In that case, the court affirmed a district court ruling that an incidental take permit issued by the Secretary of Commerce was contrary to the requirements of the MMPA. *Id.* The federal court had jurisdiction to hear the claims presented in *Kokechik* by virtue of 16 U.S.C. § 1374(d)(6), which authorizes judicial review of the terms and conditions of a permit issued by the Secretary. *See Kokechik*, 839 F.2d at 797. Thus, the case stands for the uncontroversial proposition that a citizen can seek review of the Secretary's actions under the MMPA, and does not provide authority to support Strahan's position that a private citizen can seek an injunction against a state official under the MMPA.

Defendants' argument respecting the remedy ordered in paragraph 2 has merit. Defendants argue that if the district court has no jurisdiction under the MMPA, it logically follows that the district court may not order a remedy that requires compliance with provisions of the MMPA. In paragraph 2, the district court ordered the Commonwealth officials to comply with the terms of the MMPA by applying for an incidental take permit pursuant to 16 U.S.C. § 1387. Except with respect to review of permits actually granted, Congress vested enforcement of the provisions of the MMPA in the Secretary of Commerce, not in the federal courts. *See* 16 U.S.C. § 1377.

Consequently, the district court lacked the jurisdiction to order that the defendants comply with the MMPA. We therefore vacate paragraph 2 of the district court's preliminary injunction order.

We have considered the argument of the Conservation Law Foundation that the cross-reference provision, cited by the district court, effectively makes the substantive provisions of the MMPA part of the ESA for purposes of enforcement through a citizen's suit. Although the argument is not frivolous, on balance we think that the provision does not incorporate one statute into the other. It merely prevents anyone from arguing that the less restrictive requirements of one statute supersede the more restrictive requirements of the other.

On the other hand, the substantive provisions of the Marine Mammal Protection Act appear to be triggered by the same activities that the district court, at least for preliminary injunction purposes, found to be a taking. To the extent that the defendants may fail to meet the arguably more stringent standards of the MMPA, the Secretary of Commerce might conclude that it was improper to issue a permit under the ESA for activities that were unlawful under another statute also administered by the Secretary. It is premature for this Court to decide how the matter should be resolved if the Secretary took a different view and issued an ESA permit while ignoring a violation of the MMPA.

Finally, defendants contend that the district court lacked jurisdiction under the MMPA to order the defendants to form a working group modeled on working groups required pursuant to the MMPA. The district court's order was as follows: Fourth, the Defendants will be ordered to convene an

Endangered Whale Working Group and to engage in substantive discussions with the Plaintiff, or his representative, as well as with other interested parties, regarding modifications of fixed-fishing gear and other measures to minimize harm to the Northern Right whales. 939 F.Supp. at 991. We understand the district court here to be ordering, under its equitable powers, a working group that is merely modelled on MMPA working groups dedicated to the preservation of other marine mammals. Nothing suggests that this portion of the district court's order was issued pursuant to any authority other than its equitable powers. That is, we do not read this order as emanating from the provisions of the MMPA itself, but rather from the court's inherent powers to fashion appropriate equitable relief. *See* discussion of equitable powers, *infra* at [33-34]. Thus, we find no abuse in this exercise of discretion and we do not find any error.

II. ENDANGERED SPECIES ACT

A. *Statutory and regulatory background*

The Endangered Species Act was enacted with the purpose of conserving endangered and threatened species and the ecosystems on which they depend. *See* 16 U.S.C. § 1531. The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *TVA v. Hill*, 437 U.S. 153, 180, 98 S.Ct. 2279, 2294, 57 L.Ed.2d 117 (1978). The Act empowers the Secretary of Commerce to recommend to the Secretary of the Interior that a species be listed as endangered or threatened and that the species' habitat be listed as a critical habitat. *See* § 1533(a)(2)(A). The

Secretary of the Interior, if he concurs, shall implement the designation. *See* § 1533(a)(3)(A). The Act further requires the Secretary to develop and implement plans for the conservation and survival of an endangered or threatened species. *See* § 1533(f). The Northern Right whale has been listed as endangered pursuant to the ESA. *See* 50 C.F.R. § 222.23(a).

As it relates to this litigation, the ESA prohibits any person from "tak[ing] any [endangered] species within the United States or the territorial sea of the United States." § 1538(a)(1)(B). In addition, the ESA makes it unlawful for any person "to attempt to commit, solicit another to commit, or cause to be committed, any offense defined" in the ESA. *See* § 1538(g). The term " 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."
§ 1532(19). "'Take' is defined ... in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S.Rep. No. 93-307, at 7 (1973); *see also Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703-04, 115 S.Ct. 2407, 2416, 132 L.Ed.2d 597 (1995) (citing Senate and House Reports indicating that "take" is to be defined broadly). The Secretary of the Interior has defined "harm" as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." *See* 50 C.F.R. § 17.3 (1994); *Sweet Home*, at 695-701, 115 S.Ct. at 2412- 14 (upholding the regulation as a reasonable interpretation of the statutory language). The term "person"

includes "any officer, employee, agent, department, or instrumentality ... of any State, municipality, or political subdivision of a State ... [or] any State, municipality, or political subdivision of a State...." 16 U.S.C. § 1532(13).

Under the ESA regulatory scheme, the National Marine Fisheries Service ("NMFS"), part of the National Oceanic and Atmospheric Administration ("NOAA") within the Department of Commerce, is responsible for species of the order Cetacea (whales and dolphins) under the ESA and the MMPA. *See* ESA, 16 U.S.C. §§ 1532(15), 1540; MMPA, 16 U.S.C. §§ 1362(12), 1377; Incidental Take of Endangered, Threatened and Other Depleted Marine Mammals, 54 Fed. Reg. 40,338 (1989). Under the ESA, the Secretary of Commerce, acting through the NMFS, may permit the taking of an endangered species if that taking is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." § 1539(a)(1)(B). Pursuant to an application for an incidental take permit, an applicant must submit a conservation plan discussing the impact of the incidental takings, the steps the applicant will take to minimize the impact, and the alternatives considered with reasons why the alternatives would not be implemented. *See* § 1539(2)(A).

On August 31, 1995, the NMFS implemented a prohibition on any taking of a Northern Right whale incidental to commercial fishing operations. *See* Taking of Threatened or Endangered Marine Mammals Incidental to Commercial Fishing Operations; Interim Permit, 60 Fed. Reg. 45,399 (NMFS) (Aug. 31, 1995). In addition, the NMFS recently implemented a ban on approaches within 500 yards of a Northern Right whale. *See* North Atlantic Northern Right Whale Protection; Interim Final Rule, 62 Fed. Reg. 21562 (Apr. 25, 1997). This

restriction brings the federal approach distance in line with the Massachusetts 500 yard approach prohibition. *See* 322 Code Mass. Reg. § 12.05.

Furthermore, the NMFS has proposed an interim final rule, modifying 50 C.F.R. pt. 229 and set to become effective November 15, 1997, 62 Fed. Reg. 39157 (July 22, 1997), that restricts the use of gillnet and lobster pot fishing gear during specific times of the year unless the gear conforms to marking and design requirements set forth within the provision. *See* 62 Fed. Reg. at 39184. The regulation restricts lobster pot fishing, unless in compliance with gear modification requirements, in the Cape Cod Bay Restricted Area from January 1 to May 15 of each year. *Id.* at 39185. During the remainder of the year, lobster pot gear must comply with at least two of the gear modification restrictions. *Id.* at 39186. The Great South Channel Restricted Lobster Area is similarly restricted from April 1 to June 30 of each year. Again, during the remainder of the year, lobster pot gear must comply with at least two of the gear modification restrictions. *Id.* With respect to gillnet fishing, such fishing is prohibited from January 1 through May 15 of each year unless the gear complies with modifications that may be required by regulations promulgated by the Assistant Administrator. *Id.* at 39187. During the remainder of the year, no person may engage in gillnet fishing unless the gear complies with at least two modifications listed in the Gillnet Take Reduction Technology List in paragraph (d)(9) of the section. *Id.* The same restrictions apply to the Great South Channel restricted gillnet area, with a spring closure period from April 1 to June 30 of each year and a restricted period for the duration of the year. *Id.* In all other northeast waters, restricted fishing,

with modified gillnet or lobster pot gear similar to that allowed in the Cape Cod and Great South Channel areas, is allowed. *Id.* at 39186-39187. These proposed restrictions, however, do not impact on the district court's and this court's consideration of whether Massachusetts, through its fishing licensure scheme, has violated the provisions of the ESA.

B. *Legal challenges*

The district court's reasoning, in finding that Massachusetts' commercial fishing regulatory scheme likely exacted a taking in violation of the ESA, was founded on two provisions of the ESA read in conjunction. The first relates to the definition of the prohibited activity of a "taking," see § 1538(a)(1)(B), and the second relates to the solicitation or causation by a third party of a prohibited activity, such as a taking, *see* § 1538(g). The district court viewed these provisions, when read together, to apply to acts by third parties that allow or authorize acts that exact a taking and that, but for the permitting process, could not take place. Indeed, the district court cited several opinions that have also so held. *See, e.g., Sierra Club v. Yeutter*, 926 F.2d 429, 438-39 (5th Cir.1991) (finding Forest Service's management of timber stands was a taking of the red-cockaded woodpecker in violation of the ESA); *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1301 (8th Cir.1989)(holding that the EPA's registration of pesticides containing strychnine violated the ESA, both because endangered species had died from ingesting strychnine bait and because that strychnine could only be distributed pursuant to the EPA's registration scheme); *Palila v. Hawaii Dep't of Land and Nat. Resources*, 639 F.2d

495, 497-98 (9th Cir.1981) (holding state's practice of maintaining feral goats and sheep in Palila's habitat constituted a taking and ordering state to remove goats and sheep); *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180-81 (M.D.Fla.1995)(holding that county's authorization of vehicular beach access during turtle mating season exacted a taking of the turtles in violation of the ESA). The statute not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking. We believe that, contrary to the defendants' argument on appeal, the district court properly found that a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA.

The defendants argue that the statute was not intended to prohibit state licensure activity because such activity cannot be a "proximate cause" of the taking. The defendants direct our attention to long-standing principles of common law tort in arguing that the district court improperly found that its regulatory scheme "indirectly causes" these takings. Specifically, the defendants contend that to construe the proper meaning of "cause" under the ESA, this court should look to common law principles of causation and further contend that proximate cause is lacking here. The defendants are correct that when interpreting a term in a statute which is, like "cause" here, well-known to the common law, the court is to presume that Congress intended the meaning to be interpreted as in the common law. *See Veiga v. McGee*, 26 F.3d 1206, 1210 (1st Cir.1994). We do not believe, however, that an interpretation

of "cause" that includes the "indirect causation" of a taking by the Commonwealth through its licensing scheme falls without the normal boundaries.

The defendants protest this interpretation. Their first argument is that the Commonwealth's licensure of a generally permitted activity does not cause the taking any more than its licensure of automobiles and drivers solicits or causes federal crimes, even though automobiles it licenses are surely used to violate federal drug laws, rob federally insured banks, or cross state lines for the purpose of violating state and federal laws. The answer to this argument is that, whereas it is possible for a person licensed by Massachusetts to use a car in a manner that does not risk the violations of federal law suggested by the defendants, it is not possible for a licensed commercial fishing operation to use its gillnets or lobster pots in the manner permitted by the Commonwealth without risk of violating the ESA by exacting a taking. Thus, the state's licensure of gillnet and lobster pot fishing does not involve the intervening independent actor that is a necessary component of the other licensure schemes which it argues are comparable. Where the state has licensed an automobile driver to use that automobile and her license in a manner consistent with both state and federal law, the violation of federal law is caused only by the actor's conscious and independent decision to disregard or go beyond the licensed purposes of her automobile use and instead to violate federal, and possibly state, law. The situation is simply not the same here. In this instance, the state has licensed commercial fishing operations to use gillnets and lobster pots in specifically the manner that is likely to result in a violation of federal law. The causation here, while indirect, is not so

removed that it extends outside the realm of causation as it is understood in the common law.[2]

The defendants' next argument need only detain us momentarily. They contend that the statutory structure of the ESA does not envision utilizing the regulatory structures of the states in order to implement its provisions, but that it instead leaves that implementing authority to NMFS. The point that the defendants miss is that the district court's ruling does not impose positive obligations on the Commonwealth by converting its regulation of commercial fishing operations into a tool of the federal ESA regulatory scheme. The Commonwealth is not being compelled to enforce the provisions of the ESA. Instead, the district court's ruling seeks to end the Commonwealth's continuing violation of the Act.[3]

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[2] The defendants' citation to cases in which courts refused to impose liability for a state's exercise of its regulatory activity is misplaced. In *Haddock v. Board of Dental Examiners of California*, 777 F.2d 462, 463 (9th Cir.1985), for example, the relevant statute applied only to "employers," "employment agencies," and "labor organizations," and the state's Board of Dental Examiners clearly did not fall within the definition of those terms. Under the ESA's definition of a "person" who is prohibited from exacting a taking, the Commonwealth just as clearly falls within the definition.

[3] We note that the defendants' concerns about the authority of the district court to force the Commonwealth to ban gillnet and lobster pot fishing where the federal administering agency, NMFS, has chosen not to do so are misplaced. Had the district court actually ordered such a ban, we might consider these concerns, but indeed the district court has not required the

Defendants also contend that the district court's ruling is erroneous because it fails to give deference to the position of NMFS, the federal agency charged with enforcing the ESA. The defendants' position is flawed for two reasons. First, the ESA gives NMFS, through the Secretary, discretion in authorizing takings incidental to certain commercial activity; the Act does not give a federal court, having determined that a taking has occurred, the same discretion in determining whether to grant injunctive relief. Second, the fact that NMFS has expressly declined to ban gillnet or lobster pot fishing in Cape Cod Bay does not reflect a policy determination by NMFS that such a ban is unnecessary. For these two reasons, we find the defendants' deference arguments without merit.

C. *Factual challenges*

We review the district court's findings of fact for clear error. *See Concordia Co. v. Panek*, 115 F.3d 67, 69 (1st Cir.1997). The district court found that entanglement with fishing gear in Massachusetts waters caused injury or death to Northern Right whales. *See* 939 F.Supp. at 984. Indeed, the district court cited several of the Commonwealth's documents in support of this finding, including its statement that "'[f]ive right whales have been found entangled in fixed fishing gear in Massachusetts waters; three in gillnets and two in lobster lines.'" *Id.* (quoting Right Whales in Massachusetts Waters, An

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Commonwealth in its injunction to impose such a ban. The situation complained of by the defendants is simply not before us.

Executive Summary at 2). The court further cited to affidavits of three scientists that suggested that entanglement of Northern Right whales had harmed, injured, or killed those whales. The court cited eleven occasions on which Northern Right whales had been found entangled in fishing gear in Massachusetts waters between 1978 and 1995. The court also indicated that at least fifty-seven percent of all Northern right whales have scars indicating prior entanglement with fishing gear and noted that, even where the whale survives, the entanglement still wounds the whale. Although these findings indicate only that entanglements have occurred in Massachusetts waters, the district court determined that three whales had been found entangled in gear deployed in Massachusetts waters.

The defendants contend that the factual evidence before the district court did not support a finding that the Commonwealth has perpetrated a taking. The defendants' main contention is that the "District Court made its 'taking' determination ... based on speculation that Northern Right whales have become entangled in fishing gear: (1) deployed in Massachusetts coastal waters; and (2) licensed by the Commonwealth." Appellants' Br. at 42. The defendants first state that they submitted affidavit evidence indicating that no deaths of Northern Right whales had occurred in Massachusetts coastal waters. While this may be true, it answers only half the taking question, which bars not only killings of, but also injuries to, Northern Right whales. Because the district court need not have made a determination as to whale deaths in determining whether the Commonwealth exacted a taking, we find no error.

The defendants acknowledge that the district court relied on a scientist's affidavit that was supplied by amicus curiae

Conservation Law Foundation. The defendants do not challenge the factual statements asserted in the affidavit, including the one relied upon by the district court that "[t]hree of the entanglements of endangered whales ... clearly involved fishing gear that was deployed in Massachusetts waters." Despite the defendants' protests that the district court was engaging in speculation when it found that whales have become entangled in fishing gear deployed in Commonwealth's waters, in fact the district court relied on the unchallenged factual assertion in the scientific affidavit. Thus, the defendants' first challenge to the district court's fact-finding speculation is not valid.

With respect to the district court's determination that these entanglements involved gear licensed by the Commonwealth, the district court relied on the affidavit regarding the three entanglements that occurred in Massachusetts waters. The affidavit explained that the whales were found entangled in gear "fixed" in Massachusetts waters such that the whale could not escape because it could not break free of the gear. The district court's inference that gear fixed in Massachusetts waters was licensed by the Commonwealth, and was not set illegally or brought into Massachusetts waters from another area by the whale, was reasonable and we find no clear error in that inference.

The defendants next contend that the district court ignored evidence of the significant efforts made by the Commonwealth to "minimize Northern Right Whale entanglements in fishing gear," and evidence of other causes of takings of Northern Right whales. With respect to the determination of whether a taking has occurred, the district court quite rightly disregarded such evidence. Given that there was evidence that any

entanglement with fishing gear injures a Northern Right whale and given that a single injury to one whale is a taking under the ESA, efforts to minimize such entanglements are irrelevant. For the same reasons, the existence of other means by which takings of Northern Right whales occur is irrelevant to the determination of whether the Commonwealth has engaged in a taking.

Finding neither any error of law nor any clear error with respect to the factual findings, we believe that the district court properly applied the ESA to the facts presented and was correct in enjoining the Commonwealth so as to prevent the taking of Northern Right whales in violation of the ESA.

III. SCOPE OF INJUNCTIVE RELIEF

Defendants claim that the injunctive relief granted by the district court goes beyond the scope of remedies available in an action against state officials. Specifically, defendants claim that, although the district court could have ordered an injunction barring all Commonwealth licensing activity, it could not require the Commonwealth to implement measures designed to accord Northern Right whales greater regulatory protection. Defendants argue that the statutory scheme, the Eleventh Amendment, and the Tenth Amendment all bar the measures ordered by the district court.

A. *Statutory scheme/Eleventh Amendment*

The ESA's citizen suit provisions authorize any person [to] commence a civil suit on his own behalf--(a) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof.... 16 U.S.C. § 1540(g)(1). The very fact that Congress has limited its authorization to suits allowed by the Eleventh Amendment reinforces the conclusion that Congress clearly envisioned that a citizen could seek an injunction against a state's violations of the ESA. Defendants' claim that the district court exceeded its authority to order injunctive relief against the Commonwealth under the ESA statutory scheme is ultimately grounded in the limitations provided under the Eleventh Amendment.

The Eleventh Amendment provides: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by the Citizens of another State, or by Citizens or Subjects of any Foreign State. U.S. Const. amend. XI. "The Amendment ... enacts a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject-matter jurisdiction." *Idaho v. Coeur d'Alene Tribe of Idaho*, --- U.S. ----, ----, 117 S.Ct. 2028, 2033, 138 L.Ed.2d 438 (1997). This Amendment has been interpreted to provide sovereign immunity not only to suits by citizens of another state, but also to suits by the state's citizens. *Id.* Suits invoking both diversity and federal-question jurisdiction of Article III

may be barred by the Amendment. *Id.*

Nevertheless, familiar exceptions to the sovereign immunity bar exist. A suit may be brought by a citizen against a state in two manners. The first occurs when a state waives its sovereign immunity and allows a case to be brought against it in federal court. *Id.* The other allows suits against state officials seeking declaratory and injunctive relief against the state officials in their individual capacities who act in violation of federal law. *See Coeur d'Alene Tribe of Idaho*, at --- U.S. ----, 117 S.Ct. at 2034; *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

Defendants, grasping at text in the district court opinion that suggests a limit on the extent of the *Ex Parte Young* doctrine, *see* 939 F.Supp. at 981 ("The holding of *Ex Parte Young* has been limited to actions seeking only declaratory and/or injunctive relief against State officials to halt continuing violations of federal law.")(emphasis added), contend that a federal court, after finding a probable violation by state officials in a citizen suit under the ESA, may literally do nothing more than simply order a cessation of the violation, in the course of fashioning a remedy. Defendants' understanding of the *Ex Parte Young* doctrine is too broad. The doctrine is directed only at providing a jurisdictional exception to the traditional Eleventh Amendment sovereign immunity bar by limiting a federal court's jurisdiction to hear a case involving a state defendant to one in which a plaintiff brings suit against a state official, seeking only prospective injunctive relief to "'end a continuing violation of federal law.'" *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, ----, 116 S.Ct. 1114, 1132, 134 L.Ed.2d 252 (1996) (quoting *Green v. Mansour*, 474 U.S. 64,

68, 106 S.Ct. 423, 426, 88 L.Ed.2d 371 (1985)). Under this doctrine, a federal court lacks jurisdiction to hear a case in which the plaintiff seeks retrospective and/or legal remedies. *See Edelman v. Jordan*, 415 U.S. 651, 666-69, 94 S.Ct. 1347, 1357- 59, 39 L.Ed.2d 662 (1974). Thus, the *Ex Parte Young* exception to the Eleventh Amendment limits the scope of a district court's jurisdiction to hear a case to those cases requesting prospective equitable relief against state officials, and does not place limits on the scope of the equitable relief that may be granted once appropriate jurisdiction is found. Therefore, defendants' Eleventh Amendment claim is without merit.

B. *Tenth Amendment*

Defendants argue that the district court's power to order injunctive relief is limited by the Tenth Amendment. Specifically, they argue that the Tenth Amendment bars "federal action, that 'commandeer[s] state governments into service of federal regulatory purposes,' because it is inconsistent with the Constitution's division of authority between federal and state governments.'" Appellant's Brief at 46 (quoting *New York v. United States*, 505 U.S. 144, 175, 112 S.Ct. 2408, 2428, 120 L.Ed.2d 120 (1992)). The defendants argue that the district court's ruling in effect violates federalism principles by commandeering the state's regulatory processes to ban certain commercial fishing activity that the federal agency could ban directly.

The defendants' argument is two-fold. They suggest that Congress did not intend to preempt state regulation of

commercial fishing when it enacted the ESA, and also claim that the district court's interpretation of the ESA works to preempt state authority to regulate in the area of commercial fishing.

The Tenth Amendment provides: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. U.S. Const. amend. X. Under the federalism structure suggested by the Amendment, "[t]he States unquestionably do retai[n] a significant measure of sovereign authority ... to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549, 105 S.Ct. 1005, 1016-17, 83 L.Ed.2d 1016 (1985), quoted in *New York v. United States*, 505 U.S. at 156, 112 S.Ct. at 2418. It is certainly true that, while Congress may regulate the conduct of individuals, it may not generally regulate the conduct of the states. *See New York v. United States*, 505 U.S. at 166, 112 S.Ct. at 2423 ("The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States."), quoted in *Printz v. United States*, --- U.S. ----, ----, 117 S.Ct. 2365, 2377, 138 L.Ed.2d 914 (1997). Nevertheless, a valid act of Congress, enacted pursuant to its Commerce Clause powers, seeking to regulate a particular area, is the "supreme law of the land," U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land ...."), and preempts state laws or regulations that conflict with the act. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992); *Philip Morris, Inc. v. Harshbarger*, 122 F.3d 58, 67-68 (1st

Cir.1997).

With respect to their preemption argument, the defendants contend that Congress did not intend to preempt state regulatory powers, which " 'go to the heart of representative government.' " *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S.Ct. 2395, 2401, 115 L.Ed.2d 410 (1991) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647, 93 S.Ct. 2842, 2850, 37 L.Ed.2d 853 (1973)), quoted in Appellant's Br. at 34. When Congress enacted the ESA, it intended the Act to be as far-reaching as possible and to prevent any taking of an endangered species, "whatever the cost." *TVA v. Hill*, 437 U.S. 153, 184, 98 S.Ct. 2279, 2296-97, 57 L.Ed.2d 117 (1978). "[E]xamination of the language, history, and structure of the legislation ... indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *Id.* at 174, 98 S.Ct. at 2292. The Act's prohibition on takings extends to all private entities and to "any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government." 16 U.S.C. § 1532. By including the states in the group of actors subject to the Act's prohibitions, Congress implicitly intended to preempt any action of a state inconsistent with and in violation of the ESA. We agree with the district court that the Commonwealth's regulation of commercial fishing likely results in a taking in violation of the far-reaching prohibitions of the ESA. The district court properly concluded that the scheme as it presently operates cannot continue insofar as its operation is inconsistent with the intent of the ESA. *See Palila v. Hawaii Dept. of Land & Natural Resources*, 852 F.2d 1106, 1110 (9th Cir.1988) (upholding injunction ordering state

to remove all sheep maintained by state in Palila habitat because habitat destruction by the sheep resulted in a taking of the Palila); *Palila v. Hawaii Dep't of Land & Nat. Resources*, 639 F.2d 495, 497-98 (9th Cir.1981) (holding that Hawaii's maintenance of feral sheep and goats that destroyed the habitat of an endangered species violated the ESA because the endangered species was threatened by the continuation of that activity); *Loggerhead Turtle v. County Council of Volusia County, Florida*, 896 F. Supp. 1170, 1180-81 (M.D.Fla.1995) (holding that county's authorization of beach access to vehicles, which disrupted the habitat of endangered species, resulted in a taking in violation of the ESA); *see also Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1301 (8th Cir.1989) (finding that the EPA's regulatory scheme for the registration of strychnine pesticides violated the ESA by authorizing the use by third parties of the pesticides whose strychnine ingredient was poisoning endangered species and thus supporting the proposition that a regulatory scheme authorizing third parties to engage in actions that result in takings itself violates the ESA).[4]

We turn to the court's conclusion and order. Defendants wisely do not challenge Congress' authority to enact the Endangered Species Act. Nor do they contend that the

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[4] The defendants suggest that *Defenders of Wildlife* is consistent with their position that the ESA acts only upon federal agencies and individuals because it dealt with a federal agency's regulatory scheme. The defendants' proposition ignores the clear language of the statute, which explicitly defines persons who are prohibited from engaging in a taking to include the states and state officials. *See* 16 U.S.C. § 1532(13).

Commonwealth's commercial fishing regulations, to the extent that they may conflict with the ESA, survive Supremacy Clause analysis. Instead, the defendants contend that the district court, having found that the Commonwealth's regulatory scheme likely violates the ESA, lacks the authority to order them to form a working group and engage in substantive discussions toward rectifying their statutory violation with working group members whose membership is directed ultimately by the district court. The defendants reason that the district court, through its order, has "commandee[red] the [regulatory] processes of the [Commonwealth] by directly compelling [it] to enact and enforce a federal regulatory program," *New York v. United States*, 505 U.S. 144, 161, 112 S.Ct. 2408, 2420, 120 L.Ed.2d 120 (1992), and thereby oversteps the delicate federalism line. The district court did not order the Commonwealth to ban gillnet and lobster pot fishing although the defendants incorrectly, and repeatedly, so claim throughout their brief. Rather, the injunction ordered the Commonwealth to consider means by which gillnets and lobster pots may be modified in order for the Commonwealth to avoid authorizing takings in its coastal waters in violation of federal law. The injunction did not order specific modifications, let alone ban the licensure scheme. Indeed, the court's order did not even command the Commonwealth to restrict its permitting process in any way. Thus, it is impossible to conclude that the district court commandeered or usurped the state's regulatory authority to manage commercial fishing under its regulatory scheme and we reject the defendants' contention that it did so.

The defendants' argument revolves around a line of reasoning that we find inapposite in the context of this litigation.

The defendants rely heavily on *New York v. United States*, which discussed the authority of Congress to direct the states to regulate the disposition of nuclear waste produced by the states. *See* 505 U.S. at 163-67, 112 S.Ct. at 2421-24. The Court struck down a provision of the Act as violating the Tenth Amendment's provisions, reasoning that, although Congress may directly require or prohibit certain acts, "it lacks the power directly to compel the States to require or prohibit those acts." *Id.* at 166, 112 S.Ct. at 2423. The Court recognized that Congress does not have the constitutional authority "to require the States to govern according to Congress' instructions." *Id.* at 162, 112 S.Ct. at 2421.

The defendants also cite a Fifth Circuit opinion that relies on the reasoning of *New York v. United States* to strike down the Lead Contamination Control Act ("LCCA"), which required states to establish programs for the removal of lead contaminants in school and day care drinking water systems. *See ACORN v. Edwards*, 81 F.3d 1387, 1392-95 (5th Cir.1996). Relying on *New York v. United States 's* reasoning barring Congress from directing the states to enact a particular regulatory scheme, the Fifth Circuit held that the Act's provisions requiring the states to formulate a particular regulatory scheme violated the Tenth Amendment's federalism balance. *See* 81 F.3d at 1394.

Similarly, defendants have directed our attention to *Printz v. United States*, --- U.S. ----, ----, 117 S.Ct. 2365, 2369, 138 L.Ed.2d 914 (1997), which was decided after this case was briefed and argued. In *Printz*, the Court had before it an act of Congress regulating handguns. The act, referred to as the "Brady Act," required state law enforcement officers, called

"chief law enforcement officers" ("CLEOs"), to "make a reasonable effort to ascertain within 5 business days whether receipt or possession [of a handgun by the applicant] would be in violation of the law, including research in whatever State and local record keeping systems are available and in a national system designated by the Attorney General." 18 U.S.C. § 922(s)(2), quoted in *Printz*, --- U.S. ----, ----, 117 S.Ct. 2365, 2369. Although the Brady Act does not require the CLEO to take action if he determines that a pending transaction would be unlawful, in the event that he did notify the firearms dealer, he would be required, upon request, to provide the prospective purchaser with a written statement of the reasons for the determination. *Printz*, --- U.S. ----, ----, 117 S.Ct. 2365, 2369. If the CLEO does not uncover any reason for objecting to the sale, he must destroy all related records. *Id.* The Court determined that "the Brady Act purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme." *Id.* The Court recognized that the Constitution places responsibility for administering the laws of Congress on the President. Because the Brady Act instead transferred that responsibility to the fifty states, its provisions were struck down as inconsistent with the provisions of the Tenth Amendment. In reaching this conclusion, the Court followed the reasoning of *New York v. United States*.

Although the defendants are correct when they assert that the commands of the Tenth Amendment apply to all branches of the federal government, including the federal courts, their arguments under the reasoning of *New York v. United States* and its progeny are misguided. The situation presented here is not

one in which the district court has directed the state to enact a particular regulatory regime that enforces and furthers a federal policy, as was the situation presented in the case law cited by the defendants. In complaining that the district court's order suggests that the Commonwealth must make the choice of either not regulating in a particular area or risking the federal government's commandeering its regulatory processes if it chooses to regulate, the defendants repeatedly align their position with that of the states in *New York v. United States* and *ACORN v. Edwards*.[5]

The defendants' argument ignores the distinguishing facts of those cases. First, the states in those cases were not found to be in violation of a congressional act passed pursuant to its

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[5] Defendants' argument that the situations are comparable is as follows: In fact, *New York* had "enact[ed] legislation providing for the siting and financing of a disposal facility in New York" in order to obtain the benefits of the federal act in question. *New York v. United States*, 505 U.S. at 154 [112 S.Ct. at 2416]. Under the District Court's rationale in this case, therefore, New York should have been required to take title to radioactive wastes pursuant to the federal Low-Level Radioactive Waste Policy Act, because it had not "cease[d] exercising control" over low-level radioactive waste. Likewise under the District Court's rationale, Louisiana in *ACORN*, should have been required to establish remedial action programs for the removal of lead contaminants from school and day-care drinking water systems pursuant to the LCCA, because Louisiana had distributed to local educational agencies, schools, and day care centers a "fact sheet" published by the Environmental Protection Agency ("EPA") listing non-lead free drinking water coolers. Appellants' Br. at 50.

constitutional authority. Second, the states in those cases were directed to take positive action with respect to a particular field. Here, the defendants are not being ordered to take positive steps with respect to advancing the goals of a federal regulatory scheme. Rather, the court directed the defendants to find a means of bringing the Commonwealth's scheme into compliance with federal law.

The situation faced by the district court, as it correctly recognized, *see* 939 F. Supp. at 979-80, was one held by the New York Court to be permissible under the Tenth Amendment. The Court, in discussing acceptable uses of congressional authority with respect to the states, recognized that "where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." 505 U.S. at 167, 112 S.Ct. at 2424. The district court, in answering the defendants' Tenth Amendment challenge, recognized that the Commonwealth has the choice of either regulating in this area according to federal ESA standards or having its regulations preempted by the federal ESA provisions and regulations. Because, for preliminary injunction purposes, the Commonwealth's regulation of this area is inconsistent with federal ESA standards, this situation falls squarely within the permissible balance of federal and state authority recognized by the New York Court and the Commonwealth's regulations are preempted by the federal ESA provisions.

We believe that the district court acted within the scope of its equitable powers. The ESA governs the relief available in

a citizen suit and authorizes citizen suits to enjoin acts in violation of the ESA. *See* 16 U.S.C. § 1540(g)(1)(A). "[T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313, 102 S.Ct. 1798, 1804, 72 L.Ed.2d 91 (1981) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398, 66 S.Ct. 1086, 1089, 90 L.Ed. 1332 (1946)). The ESA does not limit the injunctive power available in a citizen suit, and, thus, we understand the Act to grant a district court the full scope of its traditional equitable injunctive powers. "Equitable injunction includes the power to provide complete relief in light of the statutory purpose." *Ephraim Freightways, Inc. v. Red Ball Motor Freight, Inc.*, 376 F.2d 40, 41 (10th Cir.1967). In fashioning relief, the district court found it necessary to outline the exact contours of the Commonwealth's violation and the extent of preemption. Toward this end, the district court sought the input and assistance of interested parties, through the creation of the Working Group, which we consider "necessary and appropriate to enforce compliance with the Act." *Porter*, 328 U.S. at 400, 66 S.Ct. at 1090.

IV. FORCING UNWANTED RELATIONSHIPS

Regarding the Working Group, the defendants contend that "[e]quity is not intended to force unwanted relationships." Appellants' Br. at 53. In support of this proposition, they cite only *Brewster v. Dukakis*, 687 F.2d 495 (1st Cir.1982). In that case, a district court was presented with disputes regarding certain provisions of a consent decree concerning the treatment of mentally ill persons within the Commonwealth of Massachusetts. *Id.* at 495. In connection with its ongoing supervisory powers over the consent decree, the district court ordered the Commonwealth to create a legal advocacy program on behalf of mentally ill or retarded persons. *Id.* A panel of this court held that the language and purpose of the consent decree, from which the court's authority over the parties derived, did not empower the district court to order the Commonwealth to pay for a general services program to deal with general issues related to the subjects' disabilities. *Id.* at 498-500. The court further recognized that the district court did not have the authority to order this remedy based on its general equitable powers because, faced with no admission of liability by the Commonwealth and having found no violation by the Commonwealth, such traditional powers had not been invoked in that case.

The instant case is significantly different because the district court found a likelihood that the Commonwealth had committed a statutory violation and thereby its full equitable powers were invoked. Thus, the sole support for the defendants' contention is inapposite, and we find no merit in their argument.

V. IRREPARABLE HARM TO THE DEFENDANTS

The defendants contend that, given the contentious relationship between the parties, the district court's injunction ordering them to engage in a relationship or dialogue with Strahan inflicts irreparable harm upon the Commonwealth. Although it is generally true in the preliminary injunction context that the district court is required to weigh and balance the relative harms to the non-movant if the injunction is granted and to the movant if it is not, *see Romero-Barcelo*, 456 U.S. at 312, 102 S.Ct. at 1803, in the context of ESA litigation, that balancing has been answered by Congress' determination that the "balance of hardships and the public interest tips heavily in favor of protected species." *National Wildlife Fed'n*, 23 F.3d at 1510. The defendants have not cited any authority to the contrary and, accordingly, we follow these precedents in deferring to Congress' pronouncements regarding the weight to be given the endangered species under the ESA and find no error in the district court's order in this respect.

VI. STRAHAN'S REMAINING CLAIMS

A. *Mandatory Immediate Injunctive Relief*

Strahan contends that the district court committed reversible error by refusing to grant the injunctive relief he sought. He contends that the Court in *TVA* ruled that injunctive relief is mandatory upon a finding of a violation of the ESA. In fact, the *TVA* Court specifically rejected this proposition, stating "[i]t is correct, of course, that a federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every

violation of law." *TVA*, 437 U.S. at 193, 98 S.Ct. at 2301. The Court recognized, however, that in the instance presented, in which the activity at issue would have caused eradication of an entire endangered species if not enjoined, the only remedy that could prevent that outcome was a permanent injunction halting the activity. *Id.* at 194-95, 98 S.Ct. at 2301-02.

The district court, having determined that the Commonwealth's probable violation of the ESA could be curtailed without such extreme measures, declined to impose the injunction Strahan sought. The district court was not required to go any farther than ensuring that any violation would end. *See id.* at 193-95, 98 S.Ct. at 2301-02; *Romero-Barcelo*, 456 U.S. at 311-16, 102 S.Ct. at 1802-05 (holding that, in the face of a violation of the Federal Water Pollution Control Act, a district court is not required to enjoin any and all activity related to the Act's violation, but instead is charged with developing remedies to ensure the violator's compliance with the Act). We are satisfied that the district court was aware of the need to curtail any violation and bring about the Commonwealth's compliance with the ESA and that its order adequately achieves those ends.

B. *Error of fact*

Strahan argues that the district court erred in finding that "[w]ith the exception of the summer of 1986, '[n]orthern right whales' are rarely seen in Cape Cod Bay after May 15." 939 F. Supp. at 968. He supports his claim with information regarding sightings of Northern Right whales through 1995 that he did not present below. We will conclude that a finding is

clearly erroneous "only when, after reviewing the entire record, we are left with the definite and firm conviction that a mistake has been committed." *Clement v. United States*, 980 F.2d 48, 53 (1st Cir.1992) (quoting *Deguio v. United States*, 920 F.2d 103, 105 (1st Cir.1990)). This claim need not detain us, because, as Strahan points out in his brief, his claim is based on information not presented to the court below and, therefore, it is not properly before this court. "'Except for motions to amend based on newly discovered evidence, the trial court is only required to amend its findings of fact based on evidence contained in the record. To do otherwise would defeat the compelling interest in the finality of litigation.'" *Aybar v. Crispin-Reyes*, 118 F.3d 10, 16-17 (1997) (quoting *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1219 (5th Cir.1986)); *see also Lyons v. Jefferson Bank & Trust*, 793 F.Supp. 989, 991 (D.Colo.1992), *aff'd in part, rev'd in part*, 994 F.2d 716 (10th Cir.1993). The docket reveals that Strahan has filed no motion to amend this finding, based on newly discovered evidence. "That other evidence not in the record may negate the [d]istrict [c]ourt's inference is beside the point." *Fontenot*, 791 F.2d at 1220. Strahan may not now claim error in the district court's reasonable finding based on his own failure to present evidence to the lower court. *See Aybar*, 118 F.3d 10, 16. Given the record before it, the district court drew a reasonable inference and relied on that inference in making its findings of fact. We find no error here.

C. *Strahan's right to conduct full discovery*

In his statement of the issues, Strahan contends that the district court erred in denying him his right to full discovery in a civil action in federal district court. Beyond this bare assertion, Strahan fails to argue further in his brief in support of this contention. It is well- established that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.... It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work.... Judges are not expected to be mind readers. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace. *King v. Town of Hanover*, 116 F.3d 965, 970 (1st Cir.1997) (citations and internal quotations omitted). Accordingly, we decline to review Strahan's discovery claim.

CONCLUSION

For the foregoing reasons, the decision below is vacated in part and affirmed in part.

APPENDIX B

Richard Max STRAHAN, Plaintiff,

v.

Trudy COXE, Secretary,
Massachusetts Executive Office of Environmental Affairs,
John Phillips, Commissioner,
Massachusetts Department of Fisheries, Wildlife,
and Environmental Law Enforcement,
Philip Coates, Director,
Massachusetts Division of Marine Fisheries,

Defendants.

Conservation Law Foundation, Inc., Amicus Curiae.
Civil Action No. 95-10927-DPW.
United States District Court,
D. Massachusetts.

Sept. 24, 1996.

[reported at 939 F. Supp. 963 (D. Mass. 1996)]

MEMORANDUM

WOODLOCK, District Judge.

I.

A conservationist contends that several officials of the Commonwealth of Massachusetts have violated the Endangered Species Act ("ESA") and the Marine Mammal Protection Act ("MMPA") by authorizing the use of "gillnets"[1] and "lobster gear"[2] by commercial fishing boats in Massachusetts waters,

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[1] The Massachusetts Division of Marine Fisheries ("DMF") defines a "bottom gillnet" as "vertical walls of webbing, whether anchored or drifting, which is buoyed on the top and weighted on the bottom to remain in an upright position, designed to capture fish on or near the seabed by entanglement, gilling or wedging." 322 C.M.R. § 4.11(1). Massachusetts prohibits the use of gillnets between May 15 and November 1 within a defined management area in Massachusetts Bay. 322 C.M.R. § 4.11(2); *see also* 322 C.M.R. § 4.09(2) (restricting use of gillnets south and west of Cape Cod between April 1 and November 15).

[2] The phrase "lobster gear" apparently refers to lobster "buoy, pot, trap and car," as those terms are used in Mass.Gen.L. ch. 130, § 38, which requires a DMF permit for lobster fishing. *See also* 322 C.M.R. § 4.13(2) (defining "pot trawls" as "single pots tied together in a series and buoyed at both ends").

including areas designated as a "critical habitat" for the endangered Northern Right whale, and by allowing whale-watching ships to approach whales closely. Defendants move to dismiss and/or for summary judgment. Plaintiff seeks a preliminary injunction and a temporary restraining order.

Plaintiff has shown a sufficient likelihood that endangered whales are periodically "taken" through entanglements with gillnets and lobster gear in waters regulated by the Defendants, who have not obtained an ESA or MMPA incidental take permit from the National Marine Fisheries Service ("NMFS").[3] Because this showing is sufficient, I have denied the Defendants' motion for summary judgment on Count[4] I, which alleges a violation of Section 9 of the ESA through entanglements in gillnets and lobster gear. In addition, I have denied the Defendants' motion for summary judgment on Count II, which alleges a "taking" through habitat modification. But because Plaintiff has no cause of action under the MMPA, I have granted the motion to dismiss Count III. Finally, I have granted the Defendants' motion for summary judgment on Count IV, which alleges a violation of Section 9 through pursuit and harassment by whale-watch vessels, because there is no indication that Defendants will repeat their conduct of 1989,

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[3] Section 10 of the ESA and Section 17 of the MMPA permit certain de minimus takings if specific criteria are met and proper procedures have been followed to obtain incidental take permits. *See* 16 U.S.C. §§ 1387, 1539(a).

[4] I treat each "Claim for Relief" as a separate Count.

when they allowed approaches closer than 500 yards[5] and because the Plaintiff has not established that whales are harmed by approaches at 500 yards or more.

Having found a likelihood of success by Plaintiff on Counts I and II and an adequate showing of harm for purposes of the ESA, I will also fashion interlocutory injunctive relief although as detailed *infra*, the relief differs from that sought by the Plaintiff.

II. PROCEDURAL HISTORY

The Plaintiff, Richard Max Strahan, the national campaign director of GreenWorld,[6] filed this complaint on April 21, 1995 alleging four counts[7] of violations of the ESA and the MMPA.

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[5] I note that the federal National Marine Fisheries Service has recently proposed a rule that would prohibit any vessel maneuver that would intercept a Northern Right whale within 500 yards. *See* 61 Fed.Reg. 41116 (Aug. 7, 1996).

[6] GreenWorld is an organization dedicated to the preservation and recovery of endangered species. (See Complaint ¶ 15.) Strahan also states that he is a conservation biologist. Strahan Second Aff. at 1.)

[7] Count I claims that defendants violate § 9 of the ESA because their licensing and regulation of fishing gear in Massachusetts coastal waters allegedly results in incidental takings of Northern Right whales without a permit. (Complaint ¶ 76.) Count II alleges that the licensing of gillnets and lobster gear in the NMFS-designated critical habitat of Massachusetts

Three defendants are named in the complaint: Trudy Coxe, Secretary of the Massachusetts Executive Office of Environmental Affairs (EOEA); John Phillips, Commissioner of the Massachusetts Department of Fisheries, Wildlife, and Environmental Law Enforcement (DFW); and Philip Coates, Director of the Massachusetts Division of Marine Fisheries (DMF).

On May 9, 1995, Strahan filed an Application for a Temporary Restraining Order (TRO) and Motion for a Preliminary Injunction. The defendants moved to dismiss or in the alternative for summary judgment.

On June 15, 1995, I held a hearing on the application. At

Bay is an impermissible modification of that habitat. *Id.* ¶ 82. Count III alleges that § 103 of the Marine Mammal Protection Act (MMPA), which prohibits the taking of a marine mammal in United States coastal waters without a permit, is violated through the defendants' licensing and regulation of fishing gear in Massachusetts coastal waters because such licensing and regulation allegedly results in the entanglement of Northern Right whales in fishing gear. *Id.* ¶¶ 88-90. Count IV claims that the defendants' authorization and regulation of whale-watching activities results in the intentional pursuit and harassment of Northern Right whales in violation of § 9 of the ESA. *Id.* ¶ 93. Strahan seeks a declaratory judgment that the authorization and regulation of gill nets and lobster gear in the Massachusetts Bay critical habitat for Northern Right whales is a violation of § 9. (Prayer for Relief ¶¶ 1-2) Strahan also seeks declaratory and injunctive relief regarding fishing gear in all Massachusetts coastal waters without an incidental take permit under § 10 of the ESA and a small take permit under § 101(a)(5) of the MMPA. ¶¶ 3-6.

this hearing, I addressed a number of issues. First, concerning jurisdiction, Strahan asserted that he had provided the requisite notice to the Secretary of Commerce approximately two years before filing this suit of his intent to sue. I instructed Strahan to file an affidavit that he had, in fact, provided such notice.[8] Second, regarding Strahan's standing to bring suit, I held that I would take judicial notice of Strahan's statements during his deposition in another case involving the Northern Right whale, *Strahan v. Linnon*, slip op., No. 94-11128-DPW (as corrected May 19, 1995), unless the Defendants filed an objection by June 21, 1995.[9] Third, I also directed Strahan to file affidavits and

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[8] Strahan initially requested a one-day extension to file evidence of the notice he had allegedly provided to the Secretary of Commerce, because a "computer error destroyed the file and it cannot be replaced till [sic] June 22." (Pl.Mot. Leave to file Affidavit Late.) Strahan certified that "a copy of this motion will be mailed or hand delivered to Defendants as soon as possible." *Id.* On June 22, 1995, Strahan filed a Second Affidavit, in which he stated: "Over two years ago, in the fall of 1992, I sent a notice of intent to bring suit under the Endangered Species Act to the Defendants.... At the same time, I sent a copy of this notice to the National Marine Fisheries Service' national office in Silver Spring, MD." (Second Strahan Aff. at 1.) Strahan did not attach a copy of the notice, nor did he provide any other documentation to support his claim. Finally, on August 24, 1995, Strahan submitted an affidavit, attaching a copy of the notice of intent dated August 30, 1992.

[9] Defendants did, in fact, object to my "taking judicial notice of its ruling in Linnon to hold that Strahan has standing

other supporting documents regarding his allegations of Northern Right whale entanglement in fixed fishing gear.[10]

I subsequently allowed a motion of the Conservation Law Foundation, Inc. (CLF) for leave to file an amicus curiae brief in this case. In its amicus curiae brief, CLF attached affidavits from Charles Mayo,[11] David Mattila,[12] and Eleanor Dorsey [13] regarding the impact of fixed fishing gear on Northern Right whales and recommendations to reduce this impact.[14] Strahan thereafter moved for these amicus curiae affidavits to be re-entered into the record on his behalf. I allowed that motion.

At a status conference held on March 13, 1996, Strahan

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in this action." (Def. Reply at 11.)

[10] On June 21, 1995, Strahan filed his Affidavit alleging the entanglement of whales in fishing gear. He also filed a copy of the Humpback Whale Recovery Plan. The Defendants have moved to strike Strahan's Affidavits, contending that the affidavits contain inadmissible evidence and were filed in bad faith or solely for the purpose of delay.

[11] Mayo is a senior scientist at the Center for Coastal Studies (CCS), a private, non-profit organization in Provincetown, Massachusetts for research, education, and conservation in coastal and marine environments. (Mayo Aff. ¶ 1.)

[12] Mattila is also a senior scientist at CCS. (Mattila Aff. ¶ 1.)

[13] Dorsey is a staff scientist at CLF.

[14] The Defendants moved to strike these affidavits.

submitted a second application for a TRO and moved for an emergency preliminary injunction enjoining the defendants from issuing any new permits in Cape Cod Bay until June 1, 1996, and from revoking any existing permits. At this conference, I also directed the Defendants to submit affidavits detailing any efforts that they have undertaken regarding the Northern Right whale.[15] By endorsements on March 29, 1996, I granted in part and denied in part the Defendants' motions to dismiss and for summary judgment and noted that I could not grant a preliminary injunction in the form sought by Plaintiff. I indicated that a memorandum of decision would follow. This is that Memorandum.

At a status conference on April 12, 1996, I solicited statements from the Defendants regarding interim measures which could be taken to provide further protections to the whale populations and established a briefing schedule for additional submissions, in light of Supreme Court developments regarding the Eleventh Amendment. I heard argument principally on the Eleventh Amendment issue on May 21, 1996, and received a number of submissions thereafter.

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[15] Defendant John Phillips submitted an affidavit detailing the extent to which DFW has undertaken many of the measures suggested by the CLF in its amicus curiae brief to protect the Northern Right whale. (See Phillips Aff. ¶¶ 3-5.) Defendants also submitted the affidavit of Thomas W. French, Assistant Director of the Massachusetts Division of Fisheries and Wildlife with responsibility for the Endangered Species Programs, which further catalogued the protective measure taken by DFW with respect to Right whales. (See French Aff. ¶¶ 8-10.)

The development of this case has been extremely difficult in large part because of Plaintiff's pro se status. Unlike the companion *Linnon* litigation, see note 16 *infra*, where Plaintiff is now assisted by very competent counsel and orderly case management has been possible, here the Plaintiff's solo involvement has complicated matters considerably. The Plaintiff, while pressing a case which I find to have significant merit, is a highly aggressive and abrasive individual whose conduct has generated a number of complaints and requests by Defendants for sanctions against him. I have sought to avoid being distracted by such ancillary matters in order to address the merits of the case. Nevertheless, I am sorely aware that the Plaintiff's claims raise the prospect of substantial disruption to the fishing industry in Massachusetts and that Plaintiff is not by training or disposition capable of accommodating competing views. Consequently, I have moved diffidently in attempting to shape a means for framing and resolving this matter. The interlocutory injunctive relief detailed herein is designed to formalize and advance the necessary conversations which must take place to resolve the claims presented here.

III. FACTUAL AND REGULATORY BACKGROUND

Strahan, an officer of GreenWorld, Inc., brings suit "on behalf of" the Northern Right whale (Eubalaena glacialis); the Humpback whale (Megaptera novaeangliae); the Fin or Finback whale (Balaenoptera physalus); the Blue whale (Balaenoptera musculus); the Sei whale (Balaenoptera borealis); the Minke whale (Balaenoptera acutorostrata); and the Harbor porpoise

(Phocoena phocoena).[16] With the exception of the Minke whale, all of the whales on this list have been listed as endangered species by the federal government. *See* 50 C.F.R. § 222.23(a). In 1993, NMFS proposed to list the Gulf of Maine population of the Harbor porpoise as "threatened." 58 Fed.Reg. 3,108 (Jan. 7, 1993). The Complaint and other submissions focus on the Right whale, and briefly describe injuries to Humpback, Fin and Blue whales.

A. *Whales in Massachusetts Waters: Population and Behavioral Patterns*

1. Right Whales.

Right whales are the most endangered of the large whales, despite the fact that they have been protected from commercial whaling since 1935. *See* Final Rule: Designated Critical Habitat; Northern Right Whale, 59 Fed.Reg. 28,793 (1994) (NMFS); *cf.* Proposed Rule: Designated Critical Habitat; Northern Right Whale, 58 Fed.Reg. 29,186 (1993).[17] There are

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[16] I have discussed the status of the Northern Right whale, and many other issues raised in this case, in the context of a related suit by Strahan against the Coast Guard. *See* Memorandum and Order, *Strahan v. Linnon*, slip op., No. 94-11128-DPW (as corrected May 19, 1995).

[17] At the June 15, 1995, hearing, Defendants indicated that they do not object to my taking judicial notice of facts reported by NMFS concerning endangered whales, so long as I also recognize any positive statements NMFS has made about the Commonwealth's efforts to protect the Right whale.

only approximately 300 to 350 individual Right whales in the western North Atlantic, and the eastern North Atlantic population may be nearly extinct. 59 Fed.Reg. 28,793. Many human activities can disrupt the Right whale, including vessel activities, commercial fishing, and pollution. 59 Fed.Reg. 28,796-97.

The vast majority of Northern Right whales are present in Massachusetts waters only during spring feeding. The whales "spend the spring and early summer off the coast of New England, then in the latter part of the summer and fall, move to the waters off southern Canada." (NMFS, Right Whale Recovery Plan, TRO Ex. 1 at 5.) [During] March to May most sightings are in the Cape Cod-Massachusetts Bay area and the [Great] South Channel on the western edge of the Georges Bank. Feeding activity is the most [frequently] seen behavior at this time. Differences in distribution observed each year are ... due to prey abundance. It has been suggested that most of the northern right whale population moves through this area en route to summer feeding grounds to the north. TRO Ex. 1 at 6 (citation omitted) (brackets used where portions of text have been obscured). With the exception of the summer of 1986, "[n]orthern right whales are rarely present in Cape Code Bay after May 15." *Id.* at 10.

In an "Executive Summary" submitted to the Massachusetts legislature, the Defendants offered the following explanation of the "Importance of Massachusetts Waters to the Northern Right Whale": Approximately half of all known right whale calves in the North Atlantic use Massachusetts waters sometime in their first year of life. They are usually brought to Massachusetts in the spring when they are between 3 and 6 months old. .

Between 13% and 20% of all known North Atlantic right whales (31 to 49 individuals) were documented in the Massachusetts region annually between 1983 and 1986. At least 117 different right whales have been identified in the Massachusetts Region since 1975. This represents about half of all individuals identified in the North Atlantic Right Whale Catalogue. Right whales remained in Massachusetts waters an average of 16.5 days (range of 1 to 84 days) in the years 1983 to 1985. In 1986 an apparent change in food availability increased the average residence time to 38 days (range of 1 to 101 days). The primary importance of Massachusetts waters, particularly around Cape Cod Bay, appears to be as a feeding area. In most years there is a seasonal peak in abundance in April, with substantial numbers also occurring in March and May. (Right Whales in Massachusetts Waters, An Executive Summary, TRO Ex. 6 at 2.)[18]

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[18] This document purports to have been submitted to the General Court "as required by Chapter 12 of the Resolves of 1985," which states: RESOLVED: That the Department of Fisheries, Wildlife and Environmental Law enforcement is hereby authorized and directed, subject to appropriation, to make an investigation and study of the North Atlantic Right Whale, including an assessment of the population of said whale, and the need for and the implications of establishing measures designed to protect such population. Said department shall report to the General Court the results of such investigation and study and its recommendations, if any, together with drafts of legislation necessary to carry its recommendations into effect by filing the same with the Clerk of the House of Representatives on or before the last Wednesday in June, nineteen hundred and

2. Humpback Whales.

Humpback whales "are probably the fourth most numerically depleted large cetacean worldwide," behind the Right, Blue, and Bowhead whales. National Marine Fisheries Service, Recovery Plan for the Humpback Whale at 1 (1991) (hereinafter "Humpback Whale Recovery Plan"). The Western North Atlantic population of Humpback whales is approximately 5,505 in number. *See* Approaching Marine Mammals, 57 Fed.Reg. 34,101, 34,102 (proposed Aug. 3, 1992); *cf.* Humpback Whale Recovery Plan at 16. On the East Coast: Humpback whales regularly inhabit [U.S. waters] during spring, summer and autumn. They feed opportunistically all along the continental shelf, but the largest numbers occur from mid-April to mid-November in the western section of the Gulf of Maine, particularly the Great South Channel, Stellwagen Bank and Jeffreys Ledge; and also from July through October in the eastern section around the mouth of the Bay of Fundy. Humpback Whale Recovery Plan at 13 (citation omitted).

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eighty-eight. (approved Jan. 8, 1986). Thus, I treat it as an admission of a party- opponent, *see* Fed.R.Evid. 801(d)(2)(C) & (D), which is contained in a self-authenticating publication purporting to be issued by public authority, see Fed.R.Evid. 902(5).

3. Fin Whales.

NMFS has offered the following summary of Fin whale status: Although the status of the stocks of fin whales is unknown, it is believed to be depleted relative to historic levels, but abundant relative to other large whale species. The total world population size is about 120,000. However, no similar population exists in U.S. waters. Fin whales are included in the species of large whales that are the object of whale watching activities on Stellwagen Bank in Massachusetts Bay. Avoidance behavior by fin whales, defined as erratic changes in course, speed, behavior or respiratory rhythm, has been shown to be associated with vessel activity in Cape Cod and Massachusetts Bay. Approaching Marine Mammals, 57 Fed.Regs. 34,101, 34,102 (proposed Aug. 3, 1992). Strahan has not submitted any material concerning the Fin whale population, or the seasons in which Fin whales may be found in Massachusetts waters.

4. Blue Whales.

The Humpback Whale Recovery Plan suggests that Blue whales are more numerically depleted than Humpbacks. Humpback Whale Recovery Plan at 1. Strahan has not provided any other information concerning the population of Blue whales or their presence in Massachusetts waters. NMFS did not estimate the minimum population of the Blue whales in its draft stock assessments for marine mammals. *See* Marine Mammals, 59 Fed.Reg. 40,527 (Aug. 9, 1994).

5. Sei Whales.

Strahan has not provided any information concerning the population of Sei whales and whether they visit Massachusetts waters.

6. Minke Whales.

The Minke whale has not been listed as endangered or threatened. As will be discussed below, Strahan's only cause of action lies under the ESA, which does not cover the Minke whale.

7. Harbor Porpoise.

NMFS has proposed that the Harbor Porpoise be listed as "threatened." 58 Fed.Reg. 3,108 (Jan. 7, 1993). Section 9 of the ESA does not protect "threatened" species, only "endangered" species. *See* 16 U.S.C. § 1538(a)(1)(B) (unlawful to take any endangered species, listed under 16 U.S.C. § 1533, within the United States or the territorial sea of the United States). Consistent with its authority under Section 4(d) of the ESA, 16 U.S.C. § 1533(d),[19] the Fish and Wildlife Service

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[19] Section 4(d) provides: Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife ... with respect to endangered species; except that with respect to the taking of

(FWS) has expanded Section 9 to protect "threatened" species as well as "endangered" species. *See* 50 C.F.R. § 17.31(a) (with certain exceptions, "all of the provisions in § 17.21 [which includes prohibitions on takings] shall apply to threatened wildlife").[20] It does not appear that NMFS has issued a similar regulation. In 1990, NMFS rejected a suggestion from the Department of the Interior that it do so, stating:

The prohibitions in section 9 and exceptions in section 10 of the ESA apply only to endangered species of fish and wildlife. When a species is listed as threatened, protective regulations must be issued under section 4(d) of the ESA to provide for the conservation of the species. These regulations can establish the same requirements for threatened species as the ESA provides for endangered species or they can be less restrictive, as appropriate. Therefore, making these regulations apply to all threatened marine species is not appropriate. Permits for Incidental Taking of Endangered Marine Species, 55 Fed.Reg. 20,603, 20,603-04 (May 18, 1990). *See* 50 C.F.R. pt. 227 for

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resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 1535(c) of this title only to the extent that such regulations have also been adopted by such State. 16 U.S.C. § 1533(d).

[20] This regulation was upheld in *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 1 F.3d 1, 5-8 (D.C.Cir.1993), modified on other grounds on reh'g, 17 F.3d 1463 (D.C.Cir.1994), rev'd, — U.S. —, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995).

NMFS regulations for threatened species of marine mammals and reptiles. *Cf.* Notice of Interagency Cooperative Policy for Endangered Species Act Section 9 Prohibitions, 59 Fed.Reg. 34,272 (July 1, 1994) (NMFS and FWS) ("Under the [ESA] and regulations, it is illegal for any person ... to take ... any endangered fish or wildlife species and most threatened fish and wildlife species.") (emphasis added).

In addition, although NMFS has proposed that the Harbor porpoise be listed as threatened, the porpoise has not yet been so listed, *cf.* Proposed Rule Stage, 60 Fed.Reg. 23,160, 23,180 (proposed May 8, 1995) (NMFS) (proposed designation of critical habitat for Gulf of Maine population of Harbor porpoise) (noting "[t]he listing has not been made final to date"); 16 U.S.C. § 1533(a)(2).[21] Thus, Strahan has not stated an ESA claim on behalf of the Harbor porpoise.

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[21] Section 1533(a)(2) provides, in relevant part: With respect to any species over which program responsibilities have been vested in the Secretary of Commerce pursuant to Reorganization Plan Numbered 4 of 1970-- (A) in any case in which the Secretary of Commerce determines that such species should--(i) be listed as an endangered species or a threatened species, or (ii) be changed in status from a threatened species to an endangered species, he shall so inform the Secretary of the Interior, who shall list such species in accordance with this section;....

B. *Federal Efforts to Protect the Whales*

Endangered whales, such as Right, Humpback, Fin, and Blue whales, are protected by the Endangered Species Act and by the Marine Mammal Protection Act. Both Acts prohibit the "taking" of endangered whales. *See* 16 U.S.C. § 1538(a)(1)(B) (ESA); 16 U.S.C. § 1372(a)(2)(A) (MMPA). The ESA defines "take" as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The MMPA defines "take" as "harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. § 1362(13).

As offices within the Department of the Interior and the Department of Commerce, respectively, the United States Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service (which is part of the National Oceanic and Atmospheric Administration ("NOAA")) share responsibilities under the MMPA and ESA. *See* 16 U.S.C. §§ 1532(15), 1540 (ESA); 16 U.S.C. §§ 1362(12), 1377 (MMPA); Marine Mammal Protection Act Amendments of 1994, S.Rep. No. 220, 103d Cong., 2d Sess. 2, reprinted in 1994 U.S.C.C.A.N. 518, 519; Incidental Take of Endangered, Threatened and Other Depleted Marine Mammals, 54 Fed.Reg. 40,338 (1989). "NMFS is responsible for species of the order Cetacea (whales and dolphins) and the suborder Pinnipedia (seals and sea lions) except walrus. FWS is responsible for the dugong, manatees, polar bear, sea and marine otters and walrus." 54 Fed.Reg. at 40,338 (1989); *see also* 16 U.S.C. § 1362(12). Consistent with its responsibilities under the ESA and MMPA, NMFS is involved in various efforts to protect endangered whales.

1. Interim Commercial Fishing Permits.

NMFS recently published notice in the Federal Register that it would not issue interim incidental taking permits to vessels engaged in certain fisheries for the Western North Atlantic stock of the Northern Right, Humpback, and Fin whales. Taking of Threatened or Endangered Marine Mammals Incidental to Commercial Fishing Operations; Interim Permit, 60 Fed.Reg. 45,399 (NMFS) (Aug. 31, 1995). This was because NMFS could not find that the incidental takings of these species would have a negligible impact on their survival. *Id.* As a result, "[n]o takes of these endangered or threatened marine mammal stocks [including the right, humpback, and fin whales] incidental to commercial fishing are allowed." *Id.*

2. Recovery Plans.

The ESA requires that "[t]he Secretary shall develop and implement [recovery] plans ... for the conservation and survival of endangered species and threatened species ... unless he finds that such a plan will not promote the conservation of the species." 16 U.S.C. § 1533(f)(1).

In 1991, a Recovery Plan for the Northern Right whale was prepared for NMFS. (TRO Ex. 1 (hereinafter "Right Whale Recovery Plan")). NMFS adopted the plan on March 13, 1992. 57 Fed.Reg. 8,862 (Mar. 13, 1992). NMFS also approved a Recovery Plan for the Humpback whale at the same time, *see* 57 Fed.Reg. 8,862; Humpback Whale Recovery Plan. It does not appear that a Recovery Plan has been prepared for the Fin, Blue or Sei whales.

The Right Whale Recovery Plan explains the danger from

fishing gear as follows: Since 1975, twelve encounters with fishing gear have been recorded in the western North Atlantic. Analyses of photographic data from the New England Aquarium's photographic catalog show that 58 percent of the catalogued northern right whales have scars and injuries around the tail stock indicative of rope and net cuts. Photographs of one whale that had netting wrapped around its tail stock for more than 4 years illustrate the extensive chafing and scarification which is characteristic of entanglement survivors. Entanglement and entrapment in gillnets and lines from lobster pots, seines, and fish weirs have been recorded. Three whales are known to have died from entanglements. However, one whale, Stars, lost the rope that had been caught in her baleen from 1987-1990 and gave birth to a calf in 1991. Right Whale Recovery Plan at 11 (citations omitted).

The Humpback Whale Recovery Plan also describes entanglements as a threat: Entrapment and entanglement in active fishing gear is the most frequently identified source of human-caused injury or mortality to humpback whales. Humpback whales are large enough to break through netting before becoming entangled, but they occasionally entangle in the lead or anchor ropes which they cannot break. Drowning or starvation may result if humans do not intervene to free the whales.... The most significant known entanglement problem occurs in northeastern continental shelf waters around Newfoundland, Canada, where humpbacks are entrapped during June and July in traps and gillnets set for cod; and gillnets for salmon, lumpfish, herring, and various groundfish. The numbers of humpbacks entrapped per year have ranged from 26 to 68.... From 1976-1986, the NMFS Northeast Fisheries

Laboratory reported 18 humpback whale entanglements in fishing gear in northeastern U.S. continental shelf waters. Gillnets caused 39% of the entanglements; other gear included unspecified ropes and lines, scallop gear, and seine gear. Nine animals were freed by volunteers, 6 were known to have died, and 3 were never resighted after disappearing with gear on them. Humpback Whale Recovery Plan at 25 (citations and scientific names omitted).

Because "entanglement is a major cause of injury and mortality in northern right whales," one objective of the Right Whale Recovery Plan is to "[r]educe or eliminate injury and mortality caused by fisheries and fishing gear." *Id.* at 24. The Right Whale Recovery Plan suggests that: Guidelines, restrictions or prohibitions on types or placement of fishery gear should be considered on a regional and temporal basis to minimize or eliminate their impact on northern right whales. Current evidence indicates that gillnets are the predominant fishing gear found in all high-use areas that pose an entanglement threat to northern right whales. Offshore lobster pot fishing gear in the Bay of Fundy could also be a new threat to northern right whales. These fisheries should be restricted during the period when northern right whales are likely to be present. Right Whale Recovery Plan at 24. For the Cape Cod and Massachusetts Bays in particular, the Right Whale Recovery Plan states: Gillnets are common and have trapped northern right whales and other whale species. These nets threaten northern right whales from March to May, after which whales and nets may be more scattered. Regulations to restrict the use of gillnets during periods of high northern right whale use of these waters is a high priority.... *Id.* at 25.

The Right Whale Recovery Plan also specifies that collisions with ships are a significant cause of whale mortalities. *Id.* at 9-10. There is less certainty, however, concerning "the effects of vessel disturbance on either individual animals or segments of the population." *Id.* at 10. Observations ... in the Cape Cod Bay area indicated that northern right whales usually did not react to low amplitude engine noise or minor vessel maneuvering. Northern right whale responses to vessels are apparently dependent on the behavior in which they are engaged. Courtship and surface feeding are examples of behaviors during which northern right whales appear unresponsive to the approach of boats. Cows with calves and single long-diving whales appear to be more sensitive to sound, and have been observed to avoid boats. Northern right whale areas in the Great South Channel and Bay of Fundy are located in or near shipping lanes. The effects of interactions in these areas are not documented. However, despite the extreme harassment and hunting during the historic exploitation period, right whales were observed returning to the same areas. Right Whale Recovery Plan at 10 (citations omitted); *see also* Humpback Whale Recovery Plan at 29 (indicating that effect of vessel operations is uncertain).

3. Approach Distances.

The ESA gives the Secretary of Commerce authority "to promulgate such regulations as may be appropriate to enforce this Act," 16 U.S.C. § 1540(f). One method that NMFS has employed to protect endangered whales is the establishment of minimum approach distances.

a. Humpback Whales

NMFS' earliest efforts to create a minimum approach distance were directed at the Humpback whale. NMFS reviewed its efforts in 1992: In 1979, NMFS issued a Notice of Interpretation of harassment for humpback whales in Hawaii and defined harassment as substantial disruption of whale behavior. Inclusion of distance limits was seen as a compromise for enforcement purposes. However, by 1985, the Notice was losing its effectiveness as an enforcement tool because harassment cases were difficult to prosecute. Enforcement agents had to document substantial disruption of normal whale behavior patterns. In response to the problem of enforcing the Notice, NMFS published an interim rule that includes a 100-yard minimum approach distance to humpback whales and a 300-yard minimum distance for areas that have been designated as cow/calf pair areas. The whale watching industry in Hawaii continues to grow, and NMFS has successfully prosecuted cases of harassment since the interim rule went into effect. Although the continued growth of the thrillcraft industry in an area where humpback whales breed is cause for concern, NMFS enforcement agents believe that several highly publicized cases (one involving an $11,000 civil

penalty) has actually reduced the general level of harassment of humpback whales. Approaching Marine Mammals, 57 Fed.Reg. 34,101, 34,102 (proposed Aug. 3, 1992). See also Interim Rule, Approaching Humpback Whales in Hawaiian Waters, 52 Fed.Reg. 44,912 (Nov. 23, 1987) (codified at 50 C.F.R. § 222.31 (1994)). By contrast, NMFS recommended a 100 foot approach limit for Humpback whales in New England waters, explaining that the North Atlantic population of Humpback whales was "at or above its initial (pre-exploitation) population size," and that Humpback whales off Cape Cod appeared to have "acclimated to the presence of vessels." 52 Fed.Reg. at 44,913.

As part of the Marine Mammal Protection Act Amendments of 1994, Congress modified the NMFS approach limit as follows: In waters of the United States surrounding the State of Hawaii, it is lawful for a person subject to the jurisdiction of the United States to approach, by any means other than an aircraft, no closer than 100 yards to a humpback whale, regardless of whether the approach is made in waters designated under section 222.31 of title 50, Code of Federal Regulations, as cow/calf waters. Pub.L. No. 103-238, 108 Stat. 532, 559 (1994). Congress also terminated subsection (b) of 50 C.F.R. § 222.31, which set approach limits in cow/calf waters. *Id.* NMFS issued a final rule implementing these changes on January 19, 1995. Approaching Humpback Whales in Hawaiian Waters, 60 Fed.Reg. 3,775 (1995); 50 C.F.R. § 222.31.

b. Right Whales

On December 27, 1994, NMFS issued an advance notice of proposed rulemaking to solicit public comment on a petition by GreenWorld to establish a 500 yard "protection zone" around every Right whale and a 100 yard "protection zone" around other whales. North Atlantic Right Whale Protection, 59 Fed.Reg. 66,513, 66,514 (1994). On March 3, 1995, NMFS reopened the period for public comment until April 3, 1995. North Atlantic Right Whale Protection, 60 Fed.Reg. 11,951 (1995). On May 8, 1995, NMFS published another advance notice of proposed rulemaking concerning the protection zone. 60 Fed.Reg. 23,160, 23,184 (1995). On August 7, 1996, NMFS filed for publication in the Federal Register a proposed rule to prohibit all approaches within 500 yards of Northern Right whales, whether by vessel, aircraft, or other means. Written comments must be received by November 5, 1996. 61 Fed.Reg. 41,116 (Aug. 7, 1996).

c. All Whales

In 1992, NMFS issued a proposed rule setting a minimum approach distance of 100 yards for all whales and 50 yards for dolphins and porpoise. Approaching Marine Mammals, 57 Fed.Reg. 34,101, 34,103 (proposed Aug. 3, 1992). NMFS explained: NMFS believes the public can benefit from seeing marine mammals in their natural environment; however, the public must be aware that these animals, especially whales, are vulnerable to injury and disturbance by people, vessels and aircraft. Many whales are slow-moving, can escape only by diving, and in some regions are distributed in limited areas.

Vessel traffic may subject whales to impacts ranging from displacing cow/calf pairs from nearshore waters to expending increased energy when feeding is disrupted or migratory paths rerouted. 57 Fed.Reg. at 34,101.

NMFS withdrew its proposal for a general approach limit in March of 1993. 57 Fed.Reg. 16,519 (Mar. 29, 1993). On April 26, 1993, NMFS indicated that it would be issuing a final rule establishing a minimum approach distance in May of 1993, 58 Fed.Reg. 24,152, 24,155. In June of 1994, however, NMFS announced that it was not considering broad-based whale watching regulations but only minimum approach distance specific to Northern Right whales. 59 Fed.Reg. 28,993, 28,800 (June 3, 1994).

4. Critical Habitats.

The ESA specifies that the appropriate Secretary, "to the maximum extent prudent and determinable ... shall, concurrently with making a determination ... that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat...." 16 U.S.C. § 1533(a)(3). Designation of a critical habitat "provides notice to Federal agencies and the public that a listed species is dependent on these areas and its features for its continued existence...." *Id.*; 59 Fed.Reg. 28,793 (1994). Designation of a critical habitat relates to the consultation duties of federal agencies under Section 7 of the ESA. *See* 16 U.S.C. § 1536(a). Usually, it has no direct effect on private entities or state agencies.

On June 3, 1994, NMFS designated a critical habitat for the

Northern Right whale in portions of the Cape Cod Bay, the Stellwagen Bank, the Great South Channel, and in the Southeast United States. *See* 59 Fed.Reg. 28,793, 28,797-28,798 (1994). There is no indication on the record that NMFS has designated a critical habitat in Massachusetts waters for the Humpback, Blue, Fin, or Sei whales.

C *The Role of the Defendants*

1. General Responsibilities.

Chapter 130 of the Massachusetts General Laws vests the Division of Marine Fisheries ("DMF") with broad authority to regulate fishing in the coastal waters of the Commonwealth. Pursuant to this authority, DMF requires that virtually all commercial fishing vessels receive a permit from DMF before they may take fish, including shellfish, from coastal waters. *See* 322 C.M.R. §§ 7.01-7.05, 8.08.

According to Defendant Coates: The marine fishery jurisdiction of the Commonwealth extends to those waters within an area encompassed by the shoreline of Massachusetts, in the case of bays a straight baseline from shore to-shore, extending three nautical miles out to sea. Included in this area are all the waters of the Nantucket Sound. Federal authority over marine fishery resources beyond three miles is exercised by the National Marine Fisheries Service (NMFS). (Coates Aff. ¶¶ 5-6.) *See also* Mass.Gen.L. ch. 130, § 1 (defining "coastal waters" as "all waters of the commonwealth within the rise and fall of the tide and the marine limits of the jurisdiction of the commonwealth, but not waters within or above any fishway or dam"); 322 C.M.R. § 8.02 (coastal fisheries

conservation and management) (defining "coastal waters" as "those waters which lie three geographical miles from the shoreline").

DMF is a division of the Department of Fisheries, Wildlife and Environmental Law Enforcement, which is part of the Executive Office of Environmental Affairs ("EOEA"). *See* Mass.Gen.L. ch. 21A, §§ 2, 7, 8. The Department of Fisheries, Wildlife and Environmental Law Enforcement also contains the Division of Law Enforcement and the Division of Fisheries and Wildlife. *See* Mass.Gen.L. ch. 21, §§ 6, 7. According to Defendant Coates, the Division of Law Enforcement "has authority to enforce the statutes and regulations governing marine fisheries," (Coates Aff. ¶ 4), and the Division of Fisheries and Wildlife "has authority over all endangered species of Massachusetts including marine mammals," (Coates Aff. ¶ 3). *Cf.* Mass.Gen.L. ch. 21, § 6A (duties of division of law enforcement).

2. Gillnets and Lobster Gear.

The Division of Marine Fisheries has limited the use of gillnets and lobster gear in certain areas. *See* 322 C.M.R. § 4.09 (use of gillnets south and west of Cape Cod), § 4.11 (use of gillnets in Massachusetts Bay), § 4.13 (fixed gear marking and maximum length requirements), § 6.13 (lobster trap limit), § 8.10 (fixed gear restrictions). DMF has set a maximum total continuous length of 24,000 feet for gillnets and 2,000 feet for lobster pot trawls. *See* 322 C.M.R. § 4.13(3).

In 1994, in response to the alarming depletion of the Harbor porpoise, DMF ordered that all sink gillnets be removed from

coastal waters north of Cape Ann every November and from the Massachusetts Bay and Cape Cod Bay every March. DMF Rules Update (Nov. 2, 1994), TRO Ex. 7.

3. Right Whale Buffer Zone.

DMF has established a 500-yard "buffer zone" for Northern Right whales in Massachusetts waters. 322 C.M.R. §§ 12.00--12.05 (1993). Strahan claims, without providing any supporting evidence thereof, that Defendants have refused to enforce the buffer zone regulation. (Amended Mem. at 11 n. 2). In any event, the Eleventh Amendment bars suits in federal court alleging violations of state laws by state officials. *See* Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 106, 104 S.Ct. 900, 911, 79 L.Ed.2d 67 (1984). Moreover, this claim was not raised in the Complaint. Thus, I do not consider it in ruling on the pending motions.

4. Whale Watch Vessels.

Neither DMF nor any agency in the Executive Office of Environmental Affairs regulates the general activities of whale-watch vessels. (Coates Aff. ¶ 10.) Strahan claims, however, that whale watch vessels have been granted an exemption from the buffer zone requirement and allowed to approach to "a distance of at least 100 feet." (Complaint ¶ 65; *see also* Amended Complaint ¶ 65 ("to within a distance of 100 feet")). Coates admits he has "issued a limited number of scientific research permits to some whale watch vessels exempting them from the 500 yard buffer zone surrounding right whales for scientific research purposes upon application."

(Coates Aff. ¶ 11.) Strahan alleged, in his Complaint, that "[t]he authorization of the pursuit of Northern Right Whales by Defendants to the Dolphin Fleet, resulted in the death of a baby whale in September of [1989] from being struck by vessels and injured by propellers." (Complaint ¶ 65; see also Amended Complaint ¶ 65.) Strahan acknowledges, however, that "the Defendants has [sic] yet to issue any subsequent permits...." (Complaint & Amended Complaint ¶ 65.)

IV. JURISDICTION AND STANDING

I must address the preliminary matters of jurisdiction and standing in detail before turning to the substance of the Defendants' motion for summary judgment and Strahan's motion for a preliminary injunction.

A. *Private Rights of Action*

The first question to be answered is whether the complaint states a cause of action which may be maintained by a private party. Strahan claims violations of the Endangered Species Act and the Marine Mammal Protection Act. There is no citizen suit provision under the MMPA, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, et seq., does not apply to state officials such as the Defendants. *See* 5 U.S.C. § 701(b)(1) ("'agency' means each authority of the Government of the United States . . ."). Thus, Strahan's claims under the MMPA, which are raised in Count III of his Complaint, must be dismissed for lack of jurisdiction.

The ESA, by contrast, expressly authorizes citizen suits for injunctive relief. With certain exceptions,

> any person may commence a civil suit on his own behalf-(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof.

16 U.S.C. § 1540(g)(1); *see* also 16 U.S.C. § 1540(c).

B. ***Notice of Suit***

One of the prerequistes to an ESA citizen suit is that the appropriate Secretary be given notice and the opportunity to initiate an enforcement action before a citizen suit is filed. *See* 16 U.S.C. § 1540(g)(2)(A)(i). The rule provides that no suit may be commenced "prior to sixty days after written notice of the violation has been given to the Secretary [of Commerce or of the Interior], and to any alleged violator of any such provision or regulation[.]" The only exception to this requirement is for situations involving "an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants." 16 U.S.C. § 1540(g)(2)(C). In such cases, suit may be brought "immediately" *after* the Secretary has been given notice." *Id.*

Strahan submitted an unsigned copy of a letter dated February 15, 1995, which purports to provide notice to one of the defendants-Trudy Coxe, Secretary of the Executive Office of Environmental Affairs-that Strahan intends to bring suit

against all three defendants. (Complaint, Ex. 1). At the June 15, 1995, hearing, Defendants represented that they had received such notice. Nevertheless, they contend, correctly, that the letter to Coxe does not indicate that the Secretary of Commerce was notified of the Defendants' alleged ESA violations.

Although one court has waived the sixty-day notice requirement, *see Sierra Club v. Block*, 614 F. Supp. 488, 492 (D.D.C. 1985), other courts, including one in this Circuit, that have addressed the issue have found the notice requirement to be jurisdictional.[22] *See Maine Audubon Soc'y v. Purslow*, 672 F. Supp. 528 (D.Me. 1987) (Cyr, D.J.), *aff'd*, 907 F.2d 265 (1st Cir. 1990) (affirming imposition of monetary sanctions against counsel who filed suit one day after giving notice to defendants and secretary of interior); *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1072 (9th Cir. 1996); *Lone Rock Timber Co. v. United States Dep't of Interior*, 842 F. Supp. 433, 440 (D.Or. 1994); *Building Indus. Ass'n of S. California, Inc. v. Lujan*, 785 F. Supp. 1020 (D.D.C. 1992); *cf. Hallstrom v. Tillamook County*, 493 U.S. 20, 31-33, 110 S.Ct. 304, 311-12, 107 L.Ed. 2d 237 (1989) (holding failure to satisfy similar notice requirement under Resource Conservation and Recovery Act warranted dismissal). Thus, I informed Strahan, during the hearing on June 15, 1995, that he must prove that he provided

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[22] *But see Sierra Club v. Yeutter*, 926 F.2d 429, 434-37 (5th Cir. 1991)(holding § 1540(g)(2)(A), "though clearly mandatory, is not jurisdictional 'in the strict sense of the term,' and hence may not be availed of for the first time on appeal by an appellant seeking reversal . . .").

notice to the Secretary of Commerce before filing his Complaint or his suit would be dismissed, without prejudice, for lack of jurisdiction.

In his Affidavit of June 22, 1995, Strahan states: "Over two years ago, in the fall of 1992, I sent a notice of intent to bring suit under the Endangered Species Act to the Defendants. . . . At the same time, I sent a copy of this notice to the National Marine Fisheries' Service national office in Silver Spring, M.D." (Second Strahan Aff. at 1.) Strahan did not provide any documentation to support his claim at that time. On August 24, 1995, however, Strahan provided an affidavit, attaching a copy of the notice of intent dated August 30, 1992.

The Defendants move to strike Strahan's Affidavits, on three grounds. They argue that the best evidence rule, Fed. R. Evid. 1002, requires that the original letter to NMFS, or a certified copy,[23] be produced to prove its contents. (Def. Strike Mem. at 4 n. 5). Rule 1002 provides: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules of by Act of Congress." Under Rule 1004, however, the original is not required if it has been lost or destroyed, or if it cannot be obtained "by any available judicial process or procedure." Fed. R. Evid. 1004. As the Advisory Committee explained, "[b]asically the rule requiring the production of the original as proof of contents has developed as

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[23] Defendants are in error. A "certified copy" is not deemed equivalent to the original under the best evidence rule. *See* Fed.R.Evid. 1004 advisory committee's note ("The rule recognizes no 'degrees' of secondary evidence.").

a rule of preference: if failure to produce the original is satisfactorily explained, secondary evidence is admissible." Fed. R. Evid. 1004 advisory committe's note. Here, Strahan states that he mailed the original to NMFS. Thus, it is not readily available to him, and NMFS in Silver Spring, Maryland, is not within the jurisdiction of this Court. In addition, the precise contents of the letter need not be established. All that is required is competent evidence that Strahan notified the Secretary of Commerce of his intent to bring suit against the Defendants. As the First Circuit has explained, "[n]o evidentiary rule ... prohibits a witness from testifying to a fact simply because the fact can be supported by written documentation." *R & R Associates, Inc. v. Visual Scene, Inc.*, 726 F.2d 36, 38 (1st Cir.1984). *Cf. Flick v. Borg-Warner Corp.*, 892 F.2d 285, 288 (3d Cir.1989) ("It is elementary that the loss of a copy of a document does not foreclose establishing its contents through the testimony of the draftsman...."); Fed.R.Evid. 1002 advisory committee's note ("an event may be proved by nondocumentary evidence, even though a written record of it was made."). Thus, the best evidence rule does not require that Strahan's affidavit be stricken.

Defendants do not raise the more fundamental objection that notice to NMFS in Silver Spring may not qualify as notice to the Secretary of Commerce under 16 U.S.C. § 1540(g)(2)(i). For example, in *Save the Yaak Committee v. Block*, 840 F.2d 714, 721 (9th Cir.1988), the court held that a letter sent to the FWS regional director, but not to the Secretary of the Interior, did not satisfy the ESA notice requirement. Here, however, the Secretary of Commerce apparently has delegated all of his duties under the ESA to NOAA/NMFS. *See* Department of

Commerce, Organization Order 10-15, § 3.01(x) (delegating ESA authority), § 3.05 (authorizing redelegation) (effective Jan. 11, 1988); Delegations of Authority to the Assistant Administrator for Fisheries, NOAA Organizational Handbook, pt. II.C.25 (redelegating ESA authority)(signed Apr. 30, 1993). Absent a defense challenge on this issue, I assume that Strahan sent notice to the appropriate office. I conclude that the ESA 60-day notice requirement has been satisfied by Strahan. I therefore turn to the question whether Strahan has standing under Article III of the Constitution.

C. *Standing*

There are three constitutional requirements for standing: First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical[.]' " Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) (citations omitted) (alterations in original); *see also Libertad v. Welch*, 53 F.3d 428, 436 (1st Cir.1995) (RICO).

In a prior case brought by Strahan against the United States Coast Guard, I considered the requirements for standing in

some detail. *See* Memorandum and Order, Strahan v. Linnon, slip op. at 18-21, No. 94-11128-DPW (as corrected May 19, 1995). I concluded that Strahan had standing to bring suit under the ESA for harm to Right whales in Massachusetts waters. Defendants contend that *Strahan v. Linnon* is distinguishable, and that Strahan lacks standing in this case. I therefore review each of the standing requirements in turn.

1. Injury in Fact.

The first requirement for standing is that the actions of the Defendants invade an actual and legally-cognizable interest of Strahan's. Strahan's deposition testimony in *Strahan v. Linnon* is useful on this question. Strahan testified that he engages in personal observation of whales, from the coast and, "as many as four to five times" per year, from whale watch boats. (*Strahan v. Linnon*, Strahan Depos. at 39-40.)

The Defendants object to my taking judicial notice of this testimony. (Def.Reply Mem. at 11.) Under Fed.R.Evid. 201(b), judicial notice is appropriate only for a fact that is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Here, I take judicial notice of the fact that Strahan has testified, under oath, that he regularly observes whales in Massachusetts waters. *See E.I. du Pont de Nemours & Co., Inc. v. Cullen*, 791 F.2d 5, 7 (1st Cir.1986) (taking judicial notice of related complaint filed by plaintiff in state court); *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir.1979) ("Judicial notice is

particularly applicable to the court's own records of prior litigation closely related to the case before it.") (citations omitted); *Cagan v. Intervest Midwest Real Estate Corp.*, 774 F.Supp. 1089, 1091 n. 1 (N.D.Ill.1991) (taking judicial notice of court file in related case). I therefore do not require that Strahan submit an affidavit to the same effect. I do not take judicial notice of the fact that Strahan regularly observes whales in Massachusetts waters, as this fact is subject to reasonable dispute. *See F.D.I.C. v. O'Flahaven*, 857 F.Supp. 154, 157 (D.N.H.1994) (holding court "could not judicially notice the veracity of the allegations in the affidavits; it could only take notice that the affidavits were in fact filed and that the factual averments were in fact made"). Strahan's reported observations have not, however, been disputed by the Defendants. Regular observation of endangered whales in Massachusetts waters is a cognizable interest for standing purposes. *See Defenders of Wildlife*, 504 U.S. at 562-63, 112 S.Ct. at 2137-38 ("[o]f course, the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for the purpose of standing").

Even if I rely solely on the evidence submitted in this case, however, I find that Strahan has a cognizable interest in protecting endangered whales from death and injury in Massachusetts waters. Strahan affirms that he "routinely go[es] 'whale watching' in New England...." (Pl. Second Aff. at 2.) Strahan also states he is a "conservation biologist specializing in the conservation and recovery of endangered species," (Pl.

First Aff. at 1),[24] and is engaged in scientific research on the Northern Right whale, *id.* at 2. This provides sufficient evidence to show that Strahan has suffered, and will continue to suffer, an "injury in fact" from harm to endangered whales in Massachusetts waters. A plaintiff does not have to qualify as an expert witness in order to have a cognizable interest under Article III.[25]

2. Causal Connection.

The second requirement for standing is that Strahan's injury be "'fairly ... trace[able] to the challenged action of the defendant, and not ... the result [of] the independent action of some third party not before the court.'" *Defenders of Wildlife*, 504 U.S. at 560-61, 112 S.Ct. at 2136-37 (citations omitted) (alterations in original).

Indisputably, the actions of third parties not before the court--commercial fishing and whale watch operations--are the

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[24] Defendants argue that Strahan's claim to be a "conservation biologist " is inadmissible because Strahan has not proven he has personal knowledge of his own training and is expressing an opinion. (Def.Mem.Strike at 8.) I find these contentions to be without merit. Defendants' motion to strike Strahan's affidavits will be denied. I have not considered any inadmissible statements in the affidavits.

[25] Accordingly, it is of little significance whether Strahan's view of "scientific research" is more expansive than that of the established community of whale researchers.

immediate cause of the harm to endangered whales alleged here. Defendants do not place gillnets and lobster gear in coastal waters, nor do they operate whale watch vessels. Nevertheless, the actions of these third parties are dependent on the actions of the Defendants. Fishing vessels cannot, legally, place gillnets and lobster gear in Massachusetts waters without permission from the Defendants. And whale watch vessels cannot, legally, approach within 500 yards of Right whales in Massachusetts waters without permission from the Defendants. Thus, to the extent that he challenges the operations of licensed commercial fishing and whale watch vessels, Strahan has shown a causal connection between the injury he has suffered (and will continue to suffer) and the actions of the Defendants in issuing such licenses.

3. Redressability.

The third requirement for standing is that "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Defenders of Wildlife*, 504 U.S. at 561, 112 S.Ct. at 2136 (citations omitted).

If the Defendants were to limit further, or ban (as Strahan requests), the use of gillnets and lobster gear in Massachusetts waters, it is likely that fewer endangered whales would be harmed through entanglements. Similarly, a prohibition on approaches to within 500 yards of Right whales, with no exception for whale watch vessels, would reduce the likelihood of injury to such whales through collisions with the vessels. Thus, a favorable decision would redress Strahan's injury. Strahan therefore has standing under Article III.

D. *Tenth Amendment*

In their Reply Memorandum, Defendants argue that the Tenth Amendment bars issuance of injunctive relief. Defendants explain: It is undisputed that Strahan's ultimate goal as an alleged whale preservationist is to obtain a total ban on gill net and lobster pot fishing in Massachusetts coastal waters on the grounds that such fishing is hazardous to whales.... Since federal law does not ban such fishing outright and since neither the Executive nor Legislative Branches of the federal government appear inclined to enact such a ban in the near future, Strahan in reality is requesting that the third branch of the federal government utilize the Commonwealth's commercial fishing licensing process, to enact and enforce a federal ban on gill net and lobster pot fishing in Massachusetts coastal waters. For instance, if the Court grants the injunctive relief requested by Strahan, no gill net or lobster pot fishing can take place in Massachusetts coastal waters unless the Commonwealth obtains an incidental take permit from the United States Secretary of Commerce.... In short, the Court will have "commandeered" the Commonwealth's commercial licensing processes to enact and enforce a federal ban on gill net and lobster pot fishing in Massachusetts Coastal waters in violation of the Tenth Amendment to the United States Constitution. (Def.Reply at 2-4 (footnotes and citations omitted).)

Defendants rely on *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992),[26] in which the

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[26] Defendants also cite *Davids v. Akers*, 549 F.2d 120, 127 (9th Cir.1977), in which the court held that committee

Court struck down a provision of the Low-Level Radioactive Waste Policy Act that required states to either accept ownership of hazardous waste or regulate pursuant to Congressional directions. The Court held: "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." *New York*, 505 U.S. at 188, 112 S.Ct. at 2435.

The Defendants' Tenth Amendment claim is misplaced. Put simply, the ESA does not require the Commonwealth to regulate commercial fishing at all.[27] *Cf. FERC v. Mississippi*, 456 U.S.

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appointments in state legislatures need not be made in proportion to the strength of the major parties in the legislature, and *United States v. Best*, 573 F.2d 1095, 1102-03 (9th Cir.1978), in which the court held that suspension of a motorist's California driver's license for drunk driving on a federal enclave exceeded the scope of the federal interest and was unduly intrusive on the state's regulation of its highways. In addition to being factually distinguishable, both decisions relied on *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976) (holding state employers not subject to Fair Labor Standards Act), which was later overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), modified by, 42 U.S.C. § 2000d-7. Thus, I do not find them useful here.

[27] Defendants do not challenge the ESA provisions concerning cooperation with the states, 16 U.S.C. § 1535, or the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801 et seq. Thus, I consider only whether application of Section 9 of the ESA against the Defendants would violate the Tenth Amendment.

742, 764, 102 S.Ct. 2126, 2140, 72 L.Ed.2d 532 (1982) (upholding Public Utility Regulatory Policies Act) ("if a State has no utilities commission, or simply stops regulating in the field, it need not even entertain the federal proposals"). Nor is the Commonwealth required to modify its legislative process. Thus, the ESA gives the Commonwealth the "critical alternative" of declining to "administer" the federal program. *Cf. New York*, 505 U.S. at 176-77, 112 S.Ct. at 2428-29. If Defendants cease exercising control over the use of gillnets and lobster gear in Massachusetts waters, then they will not be held liable, under Section 9, for any subsequent harm caused by such nets.

Defendants do not contend that enforcement of Section 9 of the ESA against state agencies or officials, per se, violates the Tenth Amendment. As the Supreme Court noted in *New York v. United States*, "federal courts may in proper circumstances order state officials to comply with federal law." *New York*, 505 U.S. at 179, 112 S.Ct. at 2430. The Court explained: [T]he text of the Constitution plainly confers this authority on the federal courts, the 'judicial Power' of which 'shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States ...; [and] to Controversies between two or more States; [and] between a State and Citizens of another State.' U.S. Const., Art. III, § 2. Id.

Similarly, Article VI, Clause 2 of the Constitution provides that: "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land...." As the Supreme Court explained in *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, "[a] wealth of precedent attests to congressional authority to

displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with federal law." 452 U.S. 264, 290, 101 S.Ct. 2352, 2367, 69 L.Ed.2d 1 (1981) (citations omitted). "Although such congressional enactments obviously curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important, the Supremacy Clause permits no other result." *Id.* (citations omitted). *Cf. New York*, 505 U.S. at 160, 112 S.Ct. at 2420 ("Petitioners likewise do not dispute that under the Supremacy Clause Congress could, if it wished, pre-empt state radioactive waste regulation.").

Unlike the "take title" provision struck down in *New York v. United States*, the ESA exercises the federal pre-emption option without seeking to control the state legislative or regulatory process. The ESA simply directs that "[a]ny State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this chapter or by any regulation which implements this chapter...." 16 U.S.C. § 1535(f). As was true of the Surface Mining Control and Reclamation Act in *Hodel*, "there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Hodel*, 452 U.S. at 288, 101 S.Ct. at 2366.

For these reasons, I reject Defendants' argument that the Tenth Amendment bars issuance of injunctive relief in this case.

E. *Eleventh Amendment*

Emboldened by the Supreme Court's recent ruling in *Seminole Tribe of Florida v. Florida*, --- U.S. ----, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), Defendants have mounted a reinvigorated argument, only lightly developed in the initial briefing on these motions, that the Eleventh Amendment bars any and all of Strahan's claims against the Commonwealth under the ESA.[28] The Court in *Seminole Tribe* held that Congress did not have the power under the Indian Commerce Clause to abrogate state sovereign immunity from suit in federal court. *Id.* at ----, 116 S.Ct. at 1131-32. By expressly overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989), the Court in *Seminole Tribe* also held that the Interstate Commerce Clause does not give Congress power to abrogate state sovereign immunity. *See id.* at ----, 116 S.Ct. at 1128. That holding may arguably be extended to proscribe Congress from abrogating state sovereign immunity under the ESA, which is grounded on the Commerce Clause powers of the Congress. I do not, however, find it necessary to address this question, because it is not dispositive in the present case. I find that the Plaintiff here may maintain the case pursuant to a well-established exception to the Eleventh

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[28] Defendants apply the same analysis to any claims arising under the MMPA "[t]o the extent that a citizen suit against the States can be read into [that] statute." *Id.* at n. 14. I have determined in Part IV.A., supra, that there is no private right of action under the MMPA. Consequently, I focus in this section on the ESA.

Amendment when the relief sought is prospective.

The exception is that created by *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), which held that the Eleventh Amendment did not bar an action in the federal court to enjoin the Attorney General of Minnesota from enforcing a statute claimed to violate the Fourteenth Amendment. *See Ex Parte Young*, 209 U.S. at 159-60, 28 S.Ct. at 453-54 ("The state has no power to impart to [the state employee] immunity from responsibility to the supreme authority of the United States."). The holding of *Ex Parte Young* has been limited to actions seeking only declaratory and/or injunctive relief against state officials to halt continuing violations of federal law. *See Edelman v. Jordan*, 415 U.S. 651, 677, 94 S.Ct. 1347, 1362, 39 L.Ed.2d 662 (1974) ("a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, and may not include a retroactive award which requires the payment of funds from the state treasury.") (citations omitted); *Green v. Mansour*, 474 U.S. 64, 73, 106 S.Ct. 423, 428, 88 L.Ed.2d 371 (1985) (holding declaratory judgment relief unavailable where "[t]here is no claimed continuing violation of federal law, and therefore no occasion to issue an injunction."); *Libby v. Marshall*, 833 F.2d 402, 406 (1st Cir.1987) ("because of Ex Parte Young, a state has to 'stand trial' whenever ... a suit against an official in his official capacity to remedy a violation of federal law--is brought against it."); *Ramirez*, 715 F.2d at 697 ("The distinction between permissible and impermissible relief in such cases turns on which way Lot's wife is facing: prospective redress is allowable, retrospective redress is not."). In the present action, Strahan seeks declaratory and injunctive relief

rather than money damages payable from the public fisc. And even if the relief sought by Strahan would have an incidental effect on State revenues, "the fiscal consequences ... [will be] the necessary result of compliance with decrees which by their terms were prospective in nature." *Edelman*, 415 U.S. at 667-68, 94 S.Ct. at 1358. Thus, this action falls within the traditional scope of the exception to an Eleventh Amendment bar provided by *Ex Parte Young*.

To be sure, *Seminole Tribe* further refined the application of Ex Parte Young in cases against state officials. In *Seminole Tribe*, the Court held that *Ex Parte Young* was inapplicable to a suit under § 2710(d)(3) of the Indian Gaming Regulatory Act ("IGRA") against the Governor of Florida in his official capacity because the statute "prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right." *Seminole Tribe*, --- U.S. at ----, 116 S.Ct. at 1132. The Court stated that the remedies provided for in the statute were meant not only to define but also "significantly to limit" the potential bases for relief under the statute. *Id.* at ----, 116 S.Ct. at 1132-33.

The Defendants contend that the holding in Seminole Tribe applies with the same force to the ESA and to the MMPA as it did to IGRA. Defendants argue that: [t]he statutory remedial scheme for enforcement of the ESA and MMPA directs that ... policy questions be resolved by NMFS in rulemaking, and not by the court through adjudication. Under the current scheme, Strahan may petition NMFS to issue regulations banning gillnet and lobster pot fishing in Massachusetts coastal waters or requiring the Commonwealth to apply for incidental and small take permits under the ESA and MMPA prior to licensing such

fishing. (citation omitted). Defendants' Memorandum in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction at 21.

The Defendants overestimate the breadth of *Seminole Tribe's* impact on *Ex Parte Young*.[29] The *Seminole Tribe* gloss on *Ex Parte Young* does not affect the statutes in the present action whose remedial schemes are not similar to the one provided for in IGRA. The Court said as much when it noted that the limited remedy created by IGRA "stands in contrast to" statutes such as those authorizing suits against any person who is alleged to be in violation of the relevant Act. *See Seminole Tribe*, --- U.S. at ---- n. 17, 116 S.Ct. at 1133 n. 17. Unlike the IGRA, the ESA contains a citizen suit provision permitting any person to commence a civil suit "to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this Act...." 16 U.S.C. § 1540(g)(1)(A). *Ex Parte Young*, even as refined by *Seminole Tribe*, continues to provide an exception from the Eleventh Amendment for lawsuits such

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[29] The Supreme Court itself emphasized the limited nature of its holding when it stated that "we do not hold that Congress cannot authorize federal jurisdiction under *Ex Parte Young* over a cause of action with a limited remedial scheme. We find only that Congress did not intend that result in the Indian Gaming Regulatory Act." *Seminole Tribe*, --- U.S. at ---- n. 17, 116 S.Ct. at 1133 n. 17.

as Strahan's under the ESA.[30]

V. The Defendants' Motion for Summary Judgment

Having resolved the threshold issues, I turn to the merits of the Defendants' motion for summary judgment on Counts I, II and IV.

Under Fed.R.Civ.P. 56, summary judgment must be granted "where the record, including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, viewed in the light most favorable to the nonmoving party, reveals no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Goldman v. First Nat'l Bank of Boston*, 985 F.2d 1113, 1116 (1st Cir.1993) (citing Fed.R.Civ.P. 56(c)). In reviewing such materials, I view all the facts "in the light most favorable to the non-moving

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[30] I note that this conclusion was recently reached by the Ninth Circuit with respect to the Clean Water Act, which contains a citizen suit provision similar to that in the ESA. *Natural Resources Defense Council v. California Dep't Trans.*, 96 F.3d 420 (9th Cir.1996). In finding that Seminole Tribe had no impact on the application of *Ex Parte Young* to suits under the Clean Water Act, the Ninth Circuit observed that the citizen suit provision in the Clean Water Act specifies that it applies "to the extent permitted by the Eleventh Amendment" and that, therefore, "[i]t would seem reasonable ... that Congress implicitly intended to authorize citizens to bring *Ex Parte Young* suits...." *Id.* at 424. The parallel provision in the ESA also extends jurisdiction to the extent permitted by the Eleventh Amendment. *See* 16 U.S.C. § 1540(g)(1)(A).

party and indulge all inferences advantageous to that party, provided they arise reasonably from the record." *Villanueva v. Wellesley College*, 930 F.2d 124, 127 (1st Cir.), cert. denied, 502 U.S. 861, 112 S.Ct. 181, 116 L.Ed.2d 143 (1991).

In evaluating a summary judgment motion, "[i]nitially, the onus falls upon the moving party to aver 'an absence of evidence to support the nonmoving party's case.'" *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 841 (1st Cir.1993) (citations omitted), *cert. denied*, 511 U.S. 1018, 114 S.Ct. 1398, 128 L.Ed.2d 72 (1994). Once this has been accomplished, it is then incumbent upon the nonmovant to show that there is in fact a " 'genuine issue for trial.' " *Id.* (citation omitted). In this effort, merely conjectural or problematic evidence will not suffice; nor will simple reference to the claims presented in the pleadings. *Id.*, at 1119. Rather, an issue will be considered trialworthy only if "there is enough competent evidence to enable a finding favorable to the nonmoving party." *Goldman*, 985 F.2d at 1116. With these considerations in mind, I turn to the merits of Strahan's claims. In Counts I, II and IV Strahan contends that three different types of takings, without a permit, have been caused by the Defendants: (1) entanglement in fishing gear; (2) habitat modification in the designated critical habitat of Cape Cod Bay; and (3) pursuit and harassment by whale-watch vessels.

A. *Entanglement in Fishing Gear*

In Count I of the Complaint, Strahan alleges that the entanglement of endangered species of whales in fishing gear is a taking of that species in violation of § 9 of the ESA because the entanglement results in the killing, injuring, and/or harassing of the whales.[31] (Complaint ¶ 76.) Thus, it is necessary for me to determine whether alleged entanglements constitute a "taking" cognizable by the ESA. I also note that because substantial civil and criminal penalties may be imposed for violations of § 9,[32] the term "take" must be construed with

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[31] The Complaint describes the following incidents of entanglement: (1) Blue whale entangled in lobster gear in Cape Cod Bay in 1984; (2) Fin whale entangled in lobster gear in Cape Cod Bay in 1984; (3) Fin whale entangled in gillnet in Massachusetts Bay in 1992, "swimming slowly and in an emaciated condition"; (4) Humpback whale entangled in gillnet in Cape Cod Bay in 1982; (5) Humpback whale entangled in gillnet in Cape Cod Bay in 1986, "with ropes and line wrapped around its body lashing its mouth shut"; (6) Humpback whale entangled in lobster gear in Cape Cod Bay in 1988; (7) Northern Right whale entangled in gillnet off Wellfleet, Massachusetts, in 1976; (8) Northern Right whale entangled in lobster gear in Cape Cod Bay in 1983; (9) Northern Right whale entangled in swordfish gillnet near the George's Bank in 1993; the whale later died; and (10) Northern Right whale entangled in lobster gear off Plum Island, Massachusetts in 1984. (Complaint & Amended Complaint ¶¶ 40-49.)

[32] *See* 16 U.S.C. § 1540(a)(1) (authorizing civil fine of $25,000 for knowing violation); 16 U.S.C. § 1540(b)(1) (authorizing criminal fine of $50,000 and one year

great care.[33]

Section 9(a)(1)(B) of the ESA makes it unlawful for any "person" to "take" any endangered species of fish or wildlife within the United States or the territorial sea of the United States.[34] 16 U.S.C. § 1538(a)(1)(B). The term "take" is defined by statute as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Furthermore, under Section 9(g), "[i]t is unlawful for any person subject to the jurisdiction of the United States to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in this section." 16 U.S.C. § 1538(g).

The term "take" is to be construed liberally. *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781,

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imprisonment for knowing violation).

[33] I do not, however, find application of the "rule of lenity" to be proper in this case. *Cf. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, --- U.S. ----, ---- n. 18, 115 S.Ct. 2407, 2416 n. 18, 132 L.Ed.2d 597 (rejecting application of rule in facial challenge to FWS regulation and stating that "[e]ven if there exist regulations whose interpretations of statutory criminal penalties provide such inadequate notice of potential liability as to offend the rule of lenity, the [ESA regulation in which "harm" and "take" are defined to include habitat modification, see 50 C.F.R. § 17.3], which has existed for two decades and gives a fair warning of its consequences, cannot be one of them").

[34] The definition of "person" includes state officials such as the Defendants. See 16 U.S.C. § 1532(13).

784 (9th Cir.1995). It should be " 'defined in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife.' " *Id.* (citing S.Rep. No. 307, 93d Cong., 1st Sess., reprinted in, 1973 U.S.C.C.A.N. 2989, 2995); *see also Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, --- U.S. ----, ----, 115 S.Ct. 2407, 2416 132 L.Ed.2d 597 (1995). Indeed, courts have construed "takings" of endangered species to occur in a number of expansive ways. *See Defenders of Wildlife v. E.P.A.*, 882 F.2d 1294, 1301 (8th Cir.1989) (EPA's registration of pesticides containing strychnine constituted a taking of endangered species); *Loggerhead Turtle v. County Council of Volusia County*, 896 F.Supp. 1170, 1180-81 (M.D.Fla.1995) (artificial beach lighting and vehicular beach access found to be a taking of sea turtles); *Sierra Club v. Yeutter*, 926 F.2d 429, 438-39 (5th Cir.1991) (Forest Service's management of timber stands a taking of the red-cockaded woodpecker); *Swan View Coalition, Inc. v. Turner*, 824 F.Supp. 923, 940 (D.Mont.1992) (sufficient evidence to withstand summary judgment for grizzly bear takings claim due to open road densities in forest land); *Palila v. Hawaii Dep't of Land and Natural Resources*, 639 F.2d 495, 497-98 (9th Cir.1981) (Palila I) (state department's practice of maintaining feral goats and sheep in endangered bird's critical habitat constituted unlawful taking); *National Wildlife Federation v. Burlington Northern Railroad*, 23 F.3d 1508, 1509 (9th Cir.1994) (railroad's killing of grizzly bears along railroad tracks is a taking).

I find that there is sufficient evidence in the record before me that the entanglement of endangered whale species in fishing

gear in Massachusetts waters causes injury or death to those species. Some of this evidence can be found in the Defendants' own writings. The Defendants state that "[f]ive right whales have been found entangled in fixed fishing gear in Massachusetts waters; three in gill nets and two in lobster lines." Right Whales in Massachusetts Waters, An Executive Summary at 2, TRO Ex. 6; *cf.* Phillips Letter to NMFS dated February 24, 1995, at 2 (stating one reason for ban on gillnets was to prevent Right whale entanglements), TRO Ex. 8.

In addition, the affidavits of three scientists demonstrate that entanglement of endangered whales in fixed fishing gear have harmed, injured, or killed those whales.[35] On May 15, 1983, a Right whale was observed "thrashing around" a location three miles east of Manomet Point in Plymouth, MA because of its entanglement in ropes attached to lobster buoys. (Mayo Aff. ¶ 10.) The whale "appeared to be having difficulty breathing and appeared exhausted." *Id.* A whale marked # 2366 was found dead one year after being observed entangled with fishing lines near Provincetown.[36] *Id.* ¶ 11. A Humpback whale died on November 7, 1982 on Corn Hill Beach in Truro because of a "gillnet wrapped around its tail stock" which prevented it from

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[35] These affidavits are found attached to CLF's amicus curiae brief. Strahan moved that these affidavits be reentered into the record on his behalf. I will thus consider them as part of Strahan's submissions.

[36] Photographs attached to the Mayo Affidavit also show injuries to the whale from the lines. (Mayo Aff. ¶¶ 12-13; Mayo Aff.Att. A and B.)

eating. (Mattila Aff. ¶ 5.) Right whales were also found entangled in lobster and other fishing gear in Massachusetts waters on June 16, 1978, May 13, 1982, October 14, 1985, May 15, 1983, August 29, 1986, August 7, 1993, November 17, 1994 (Mayo Aff. ¶¶ 15-17; Dorsey Aff. ¶¶ 17-21), and on August 17, 1995. (Maher Aff. ¶¶ 3-7.) At least one of these whales was not expected to survive its injuries from the gear. (Mayo Aff. ¶ 17.) Humpback whales have been found similarly entangled in fishing gear in Massachusetts waters. (Dorsey Aff. ¶¶ 27-35.)

The available scientific data indicates that although the documentation of entanglement in fishing gear is relatively infrequent, 57% of all Right whales have "scars around the tail stock that are apparently due to fishing gear ... [which] suggests that entanglements are more common than reported." (Dorsey Aff. ¶ 9 (citing S.D. Kraus, Rates and Potential Causes of Mortality in North Atlantic Right Whales (Eubalaena Glacialis), 6 Marine Mammal Science 278-91)). Five of 26 Right whale entanglements in the Western North Atlantic Ocean resulted in the direct or indirect death of the whale. (Dorsey Aff. ¶ 10.) Whales that survive the entanglement still receive wounds from the entanglement. Id. ¶ 17; *see also* Right Whale Recovery Plan at 11 (describing injuries from fishing gear); Humpback Whale Recovery Plan at 25 (stating that fishing gear entanglement and entrapment are "the most frequently identified source[s] of human-caused injury or mortality to humpback whales").

The scientific evidence before me also indicates that "lobster pot and gillnet fishing gear in Cape Cod and Massachusetts Bays pose a threat of harm to individual right whales and a

potential threat to the recovery of the species." (Mayo Aff. ¶ 19; see also Mattila Aff. ¶ 13.) The Defendants contend that Strahan cannot show that the entanglements were from fishing gear permitted by the state. The scientific evidence, however, indicates otherwise. For example, at least three of the entanglements described supra "involved fishing gear that was deployed in Massachusetts waters."[37] (Dorsey Aff. ¶ 36.) It is also quite likely that this number is higher because of the infrequency of observations, because the whale is not anchored to one location by the fishing gear, and because identifying parts

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[37] Whether the actual number is higher than the three known to be directly due to Massachusetts-permitted fishing gear is immaterial because "there are so few right whales that every one that dies represents a significant reduction in the available gene pool necessary to assure viability of the species." (Mattila Aff. ¶ 13.) In addition, I note that the ESA "does not distinguish between a taking of the whole species or only one member of the species. Any taking and every taking--even of a single individual of the protected species--is prohibited by the Act." *Loggerhead Turtle*, 896 F.Supp. at 1180 (citing 16 U.S.C. § 1538). The First Circuit also impliedly recognized this point in *American Bald Eagle*. There, the First Circuit found that there was "no evidence that any eagles at Quabbin actually ingested lead slug or that any eagles ate deer carrion containing lead slug." *American Bald Eagle v. Bhatti*, 9 F.3d 163, 166 (1st Cir.1993) (emphasis added). The First Circuit's rejection of the statement "that a one in a million risk of harm is sufficient to trigger the protections of the ESA" is not to the contrary. The issue there was the risk of future harm to an endangered species and the absence of any evidence of actual harm.

of the gear do not remain attached to the whale. *Id.* ¶¶ 23, 24, 36. The Defendants do not dispute any of this evidence. Based upon the scientific affidavits, therefore, there is sufficient evidence to support Strahan's factual allegations that endangered whales have been taken through entanglement in fishing gear permitted by the Defendants in Massachusetts waters.

Additionally, I find that it is irrelevant that Defendants' permitting of commercial fishing gear is only an indirect cause of whale entanglement in those lines. The Defendants' permitting activities are similar to the EPA's registration of pesticides containing strychnine which the Eighth Circuit found to be a violation of § 9 of the ESA. *Defenders of Wildlife*, 882 F.2d at 1300-01. The registration of pesticides containing strychnine, as opposed to their subsequent use, was not the immediate cause of the deaths of any endangered animals, but was an indirect cause. *Cf. Sweet Home*, --- U.S. at ----, 115 S.Ct. at 2413. The takings occurred because pesticides could not be sold or distributed without EPA permission: The EPA's strychnine registrations had a prohibited impact on endangered species. First, the record shows endangered species have eaten the strychnine bait, either directly or indirectly, and as a result, they have died. The district court noted that defendants did not seriously dispute these poisonings had occurred. Second, strychnine can be distributed only if it is registered. Consequently, the EPA's decision to register pesticides containing strychnine or to continue these registrations was critical to the resulting poisonings of endangered species. The relationship between the registration decision and the deaths of endangered species is clear. We thus conclude the EPA's registrations constituted takings of endangered species. 882 F.2d

at 1301 (citations omitted). *See also National Wildlife Federation v. Hodel*, 15 Envtl.L.Rep. (Envtl.L.Inst.) 20891, 20893, 1985 WL 186671 (E.D.Cal.1985) (holding that the Fish and Wildlife Service's decision to authorize the use of lead shot ammunition constituted a taking of bald eagles under the ESA) "It is irrelevant whether the taking is direct or indirect." *United States v. Glenn-Colusa Irrigation District*, 788 F.Supp. 1126, 1133 n.13 (E.D.Cal.1992) (holding that pumping of water from river, which caused endangered Chinook salmon to be trapped on fish screens, constituted a taking); *cf. Sweet Home*, --- U.S. at ----, 115 S.Ct. at 2413.

The permitting of fishing gear is analogous to the registration of strychnine. In the absence of permitting, no fish entanglement could occur. *See* Mass.Gen.L. ch. 130, § 17A (management of marine fisheries); Mass.Gen.L. ch. 130, § 80 (with exceptions for holders of other permits, "no person shall fish for or take fish for commercial purposes in the coastal waters ... unless he is the holder of a commercial fisherman permit"); Mass.Gen.L. ch. 130, § 38 ("A person shall not fish for or take lobsters or edible crabs in coastal waters ... without a permit issued by the director [Coates]"); 322 C.M.R. §§ 4.09, 4.11 (gillnets), §§ 6.13, 6.14 (lobster fishing), §§ 7.01-7.05 (permits); § 7.01(7) ("The Director [of DMF] may at any time, in his discretion, attach any written conditions or restrictions to the permit deemed necessary or appropriate for purposes of conservation and management or to protect the public health, welfare and safety."); § 8.10 ("A regulated fishery permit shall be required to harvest, catch, or take any species of fish by means of a gillnet to be issued in accordance with 322 CMR 7.01(4)(a).").

Additionally, the scientific evidence in this case meets the First Circuit's standard that a taking requires a showing "that the alleged activity has actually harmed the species or if continued will actually, as opposed to potentially, cause harm to the species." *American Bald Eagle v. Bhatti*, 9 F.3d 163, 166 (1st Cir.1993). In *American Bald Eagle*, the First Circuit considered an ESA challenge to the decision of the Massachusetts DFW to allow limited deer hunting on a state reservation that was inhabited by bald eagles.[38] The court affirmed the denial of injunctive relief, finding that no studies were presented that demonstrated that the use of lead slugs was scientifically proven to injure bald eagles. *Id.* at 165. In contrast here, Strahan has presented sufficient evidence that entanglements in fishing gear injures or kills endangered whales. *See supra*.

I also find that Strahan has presented sufficient evidence that the Defendants know or should know that fishing gear injure or kill endangered whales.[39] *See*, *e.g.*, Executive Summary at 2, TRO Ex. 6; Charles Mayo, Philip Hamilton, & Marilyn K. Marx, Report to the Commonwealth of Massachusetts, Division of Marine Fisheries: Characteristics of the Population and

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[38] I also note that implicit in the American Bald Eagle decision is that a state agency can "take" an animal, in violation of § 9 of the ESA, through its regulatory actions.

[39] The Supreme Court in *Sweet Home* stated that the ESA contained "ordinary requirements of proximate causation and foreseeability" and " 'but for' causation." *See Sweet Home*, --- U.S. at ---- n. 13, 115 S.Ct. at 2414 n. 13; id. at ----, 115 S.Ct. at 2419-20 (O'Connor, J., concurring).

Habitat Use Patterns of the Right Whale Eubalaena glacialis In the Waters of the Commonwealth, at 7 (1987) ("A variety of materials placed in the marine environment appear to impact right whales. Of those, fishing gear, particularly fixed nets, anchored lines and untended floating nets appear to have the greatest potential impact") (prepared pursuant to a DMF contract with the Center for Coastal Studies and submitted by DMF to the General Court see TRO Ex. 6 at 5), TRO Ex. 3; Scott D. Kraus & Charles A. Mayo, Recommendations for Research and Management of Right Whales in Massachusetts Waters at 24 (1987) ("We recommend serious consideration of a seasonal ban on fixed fishing gear within the areas identified as high-use right whale habitat") (funded by DMF see TRO Ex. 4 at 19), TRO Ex. 5. For all of these reasons, I will deny the Defendants' motion for summary judgment on Count I.

B. *Habitat Modification by Gillnets and Lobster Gear*

In Count II of his Complaint, Strahan alleges: The Defendants by licensing and regulating the deployment of fixed-fishing gear (in the form of gill nets and lobster gear) in Massachusetts Bay in habitat that has been designated by NMFS as listed critical habitat of the Northern Right Whale is [sic] violating the take prohibitions of Section 9 of the ESA by taking the Northern Right Whales through "harm." ... The Defendants' deployment of gill nets, lobster gear, and other fishing gear in waters in an area (Cape Cod Bay) that is within boundaries of the listed critical habitat for these whales, has significantly degraded the critical habitat to the point where

Northern Right Whales will become killed and injured, directly through the entanglements with the deployed fishing gear, as well as through the significant impairment of their feeding, swimming, and other essential behaviours.... Complaint ¶ 82; *see also* Amended Complaint ¶ 82. Strahan thus claims that the deployment of fishing gear in an area that is designated a critical habitat of endangered Northern Right whales is a harmful modification of that habitat and a taking in violation of the ESA.[40] The Supreme Court held last term in *Babbitt v. Sweet*

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[40] I note that the designation of a critical habitat for an endangered species has no direct effect on state officials such as the Defendants. Rather, the federal government's designation of a critical habitat implicates only certain duties and responsibilities of federal officials. 16 U.S.C. § 1536(a); *see also* Proposed Rule, Designated Critical Habitat; Northern Right Whale, 58 Fed.Reg. 29,186, 29,187 (proposed May 19, 1993) (final June 3, 1994, 59 Fed.Reg. 28,793) (stating that critical habitat designation "applies only to actions with Federal involvement e.g., authorized, funded, conducted), and does not affect exclusively state or private activities"). I do not, however, read Strahan's Complaint so narrowly. Strahan's Complaint alleges that because Northern Right whales intensively use the designated critical habitat area, the presence of fishing gear in this area is a modification of that habitat that "results in enhance[d] risk to the species from adverse activities that would not be as significant else [ ]where." (Complaint ¶ 57.) *See also* Proposed Rule, Designated Critical Habitat; Northern Right Whale, 58 Fed.Reg. at 29,187 (stating that "critical habitat designation contributes to species conservation primarily by identifying critically important areas and by describing the features within the areas that are essential to the

Home Chapter of Communities for a Great Oregon, that takings under the ESA can include habitat modifications that actually kill or injure wildlife, --- U.S. at ----, 115 S.Ct. at 2416. Takings can also include a "harm" to a protected species.[41] *See* 50 C.F.R. § 17.3(c) (West 1995). This harm can "encompass[ ] indirect as well as direct injuries". *Sweet Home*, --- U.S. at ----, 115 S.Ct. at 2413. Thus, even activities that are "not intended to harm an endangered species, such as habitat modification, may constitute unlawful takings under the ESA unless the Secretary permits them." *Id.* at ----, 115 S.Ct. at 2414. This is because the statutory language is clear that "actions or effects that do not require direct applications of force" may still be considered a "taking". *Id.* at ----, 115 S.Ct. at 2415.

In *Sweet Home*, the Supreme Court also affirmed the Ninth Circuit's interpretation of the word "harm" in *Palila v. Hawaii Dep't of Land and Natural Resources*, 852 F.2d 1106 (9th Cir.1988) (*Palila II*). *Sweet Home*, --- U.S. at ---- 115 S.Ct. at 2412. In *Palila II*, the Ninth Circuit held that an impermissible habitat modification, and thus a taking, occurred where a state

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species, thus alerting public and private entities to the importance of the area").

[41] "Harm" can include "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3(c) (West 1995).

agency maintained feral sheep in an endangered bird's critical habitat. *Palila II*, 852 F.2d at 1110. The sheep destroyed the woodlands upon which the endangered bird was solely dependent. *Id.* at 1107 n. 2. In affirming the trial court's order to remove the sheep, the Court of Appeals stated that this habitat degradation could result in extinction of the bird species and thus was a "harm" and a "taking" under the ESA. *Id.* at 1110.

At least one court since *Sweet Home* has addressed the issuance of an injunction based upon a habitat modification claim. In *Loggerhead Turtle v. County Council of Volusia County, Florida*, 896 F.Supp. 1170, 1172 (M.D.Fla.1995), the Florida District Court considered a claim that a county's beach-related ordinances for artificial lighting and vehicular access posed an immediate danger to endangered and threatened sea turtles. *Loggerhead Turtle*, 896 F.Supp. at 1172-73. Because artificial beach lighting had the effect of drawing turtle hatchlings toward the light, rather than the sea, and because driving vehicles on the beach destroyed turtle nests, the court found that the lighting and vehicular access constituted a taking of the turtles. *Id.* at 1181-82. *See also Forest Conservation Council*, 50 F.3d at 788 (summary judgment inappropriate where sufficient evidence that clear-cutting of 40 acres of timber was a habitat modification that would significantly impair endangered spotted owl).

Based upon the *Sweet Home* analysis, I thus find that Strahan has sufficiently stated a claim that the permitting of fixed fishing gear by the Defendants results in a harmful taking of endangered whales through the modification of their habitat. Portions of Cape Cod Bay, Stellwagen Bank, and the Great

South Channel have been designated as critical Right whale habitat. *See* 59 Fed.Reg. 28,793 (June 3, 1994). In addition, the Commonwealth of Massachusetts has restricted the use of gillnets south and west of Cape Cod and within parts of Massachusetts Bay during certain times of the year because of the importance of this area to the whale. *See* 322 C.M.R. §§ 4.09(2) & 4.11(2). These areas accordingly appear "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A). I will thus deny the Defendants' motion for summary judgment on Count II.

C. *Pursuit and Harassment by Whale Watch Vessels*

In Count IV of his Complaint, Strahan claims that the Defendants allow whale watch ships to "take" Northern Right whales by pursuing and harassing the whales. (Complaint & Amended Complaint ¶ 93.) He asks this Court to "enjoin the Defendants from authorizing any person or issuing any license pursuant to the provisions of 322 C.M.R. 12.00 et seq., to allow the pursuit of any Northern Right Whale at any distance and to allow operation or presence of any person or vessel to a Northern Right Whale." (Complaint & Amended Complaint, Prayer for Relief ¶ 7.)

Because Defendants do not regulate the general activities of whale watch vessels, (Coates Aff. ¶ 10), I consider Strahan's claim in Count IV only as it relates to DMF's issuance of "a limited number of scientific research permits to some whale watch vessels exempting them from the 500 yard buffer zone [.]" (Coates Aff. ¶ 11). Strahan contends that the last such

permit was issued in 1989, and resulted in the death of a baby Right whale. (Complaint & Amended Complaint ¶ 65.) He states: "After this tragedy, the Defendants has [sic] yet to issue any subsequent permits but a real possibility exists that they will. The Defendants have never claimed that they would not issue any more permits to pursue Northern Right Whales." (Complaint & Amended Complaint ¶ 65.)

Under these circumstances, there is no basis to issue injunctive relief to prevent Defendants from issuing such permits because Strahan has not shown a likelihood that the Defendants will repeat their actions of 1989. As the First Circuit recently noted, "[c]ourts should always be hesitant to answer hypothetical questions. That hesitancy does not evaporate merely because a suit is couched as a plea for declaratory relief." *Ernst & Young v. Depositors Economic Protection Corp.*, 45 F.3d 530, 538 (1st Cir.1995) (citations omitted). Here, even greater hesitancy is appropriate because Strahan seeks injunctive, rather than declaratory relief. *Cf. Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 5 (1st Cir.1991) (noting court must consider potential for irreparable injury before issuing injunction).

I note further that Strahan has made no showing that whales are disturbed, injured, or otherwise "taken" by approaches at 500 yards.[42] [FN42] Defendants are entitled to summary judgment on Count IV.

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[42] Injunctive relief cannot issue based solely on the possibility that an endangered species might be disturbed. A plaintiff must show actual harm or harassment. *See American Bald Eagle v. Bhatti*, 9 F.3d 163, 166 (1st Cir. 1993).

D. *Summary*

Strahan has sufficiently shown that the Commonwealth's licensing of fixed fishing gear by commercial fishing operations had caused and is likely to continue to cause actual harm to endangered whales if such licensing continues. Furthermore, Strahan has stated a sufficient alternative claim that such licensing may result in impermissible habitat modification to the whale's environment. Strahan has not, however, stated a sufficient claim on Count IV, and he does not have a cause of action on Count III. Once it is established that a given action is sufficiently likely to cause actual harm to an endangered species, the equitable powers of the court may be deployed. I address equitable remedies in the next section.

VI. STRAHAN'S MOTION FOR A PRELIMINARY INJUNCTION

The test for the issuance of a preliminary injunction under the ESA differs from the traditional test.[43] For cases involving the ESA, "Congress removed from the courts their traditional

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[43] Under the traditional test, a court will consider the following four factors in determining whether to issue a preliminary injunction: 1. The likelihood of success on the merits; 2. The potential for irreparable injury; 3. The balancing of the relevant equities (most importantly, the hardship to the nonmovant if the restrainer issues as contrasted with the hardship to the movant if interim relief is withheld); and 4. The effect on the public interest of a grant or denial of the restrainer. *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 5 (1st Cir.1991) (citations omitted).

equitable discretion in injunction proceedings of balancing the parties' competing interests." *National Wildlife Federation*, 23 F.3d at 1511 (citing *Friends of the Earth v. United States Navy*, 841 F.2d 927, 933 (9th Cir.1988) (citation omitted)). The statutory language, history, and structure of the ESA "indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *TVA v. Hill*, 437 U.S. 153, 174, 98 S.Ct. 2279, 2292, 57 L.Ed.2d 117 (1978). "In *TVA v. Hill*, [the Supreme Court] held that Congress had foreclosed the exercise of the usual discretion possessed by a court of equity." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313, 102 S.Ct. 1798, 1804, 72 L.Ed.2d 91 (1982) (distinguishing statutory language of the Federal Water Pollution Control Act from the ESA); *accord Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 543 n. 9, 107 S.Ct. 1396, 1403 n. 9, 94 L.Ed.2d 542 (1987). Under the ESA, "the balance of hardships and the public interest tips heavily in favor of protected species." *National Wildlife Federation*, 23 F.3d at 1511 (citations omitted).

On the present record, it is clear that endangered whales use Massachusetts coastal waters where gillnets and lobster gear are placed, and that gillnets and lobster gear have harmed endangered whales and are likely to continue doing so. "[C]ourts have granted injunctive relief only where petitioners have shown that the alleged activity has actually harmed the species or if continued will actually, as opposed to potentially, cause harm to the species." *American Bald Eagle*, 9 F.3d at 166. Defendants have been aware of the actual harm to endangered whales from fixed fishing gear since 1988, at the latest. *See, e.g.*, Executive Summary at 2, TRO Ex. 6; Mayo

Report at 7, TRO Ex. 3; Kraus Report at 24, TRO Ex. 5; Phillips Aff. ¶¶ 3-5. If Defendants continue to authorize the use of gillnets and lobster gear in Massachusetts coastal waters while endangered whales are present, there is a strong likelihood that endangered whales will be "taken" in violation of the ESA. *Cf. In re Pye*, 38 F.3d 58, 63 (1st Cir.1994) (holding that when the interim relief sought by the plaintiff " 'is essentially the final relief sought, the likelihood of success should be strong' ") (citation omitted); *see also Gately v. Massachusetts*, 2 F.3d 1221, 1224 (1st Cir.), *cert. denied*, 511 U.S. 1082, 114 S.Ct. 1832, 128 L.Ed.2d 461 (1994).

In light of these facts, I conclude that interlocutory relief, albeit not in the form sought by Plaintiff, is warranted at this time. The difficulty is in fashioning an injunction that respects the contours of both the powers and limitations of a federal court and the protection afforded to an endangered species.

CLF has urged that injunctive relief be granted in the following way: 1. preparation of a mailing to all existing holders of Massachusetts fisheries permits and to all applicants for such permits containing the following information: a. a description of endangered species of whales, b. an explanation of why entanglements of such whales should be promptly reported, and c. methods of reporting such entanglements by telephone and marine radio; 2. preparation of weekly surveillance flights over right whale critical habitat to occur from January through April 1996 with the purpose of detecting entangled whales; and 3. consultation with the National Marine Fisheries Service and the Center for Coastal Studies, to ensure that the two tasks listed above are accomplished in the most effective manner. (CLF Brief at 26 (citations omitted).) At the

status hearing on March 13, 1996, I asked the Defendants to address, by way of affidavit, whether the Commonwealth had undertaken any of these measures. Commissioner of DFW John Phillips submitted an affidavit stating that weekly surveillance flights over critical habitat areas began this year during the months of January through April. (Phillips Aff. ¶ 5.) The purpose of these flights were to spot any entanglements of whales in fishing gear and to report the same to the Center for Coastal Studies. *Id.* ¶ 5(a). DFW has also scheduled meetings with NMFS and the U.S. Coast Guard to increase surveillance flights for the purpose of broadcasting warnings of whale sightings over marine frequencies of ship traffic and fixed gear fishermen.[44] The affidavit also indicated that DFW is:

> (1) promulgating regulations that prohibit the use of more than 800 pots by coastal lobster fishermen; (2) issuing a moratorium on the issuance of new sink gill net regulated fishery permits; (3) banning the use of sink gill nets in all Massachusetts coastal waters (a) south of Boston during the month of March, (b) north of Cape Ann during the month of November, and (c) south of Cape Cod from April to November 15; (4) administering a statutory moratorium on the issuance of any new coastal lobster fishing permits; and (5) making plans to circulate information on Right Whale sightings ... [in order] to notify commercial fixed gear

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[44] This presumably will allow ship traffic and fixed gear fishermen to avoid areas where endangered whales have been spotted.

fishermen. Id. ¶ 5(d).

In order to encourage further formal consultations by the Defendants with a view toward developing additional protective measures, I will order the following:

First, that the Defendants apply for an incidental take permit from NMFS on or before October 18, 1996, *see* 16 U.S.C. § 1539(a), for Northern Right whales;

Second, that the Defendants apply for a permit under the Marine Mammal Protection Act on or before October 18, 1996, *see* 16 U.S.C. § 1387, for Northern Right whales;[45]

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[45] As part of the Marine Mammal Protection Act Amendments of 1994, Congress enacted a comprehensive provision governing incidental takes of marine mammals in commercial fishing operations. See Pub.L. No. 103-238, § 11, 108 Stat. 532, 546-57 (1994) (codified at 16 U.S.C. § 1387). The Endangered Species Act and the MMPA both apply to the incidental taking of endangered marine mammals through commercial fishing operations. *See* 16 U.S.C. § 1387(a)(2). In particular, "[e]xcept as otherwise provided in [the ESA], no provision of [the ESA] shall take precedence over any more restrictive conflicting provision of the Marine Mammal Protection Act...." 16 U.S.C.A. § 1543 (West 1995). I recognize that in correspondence with the Defendants, NMFS has offered an advisory view that "it does not anticipate issuing any incidental take authority ... with respect to right whales." Second Aff. of Philip G. Coates, Ex. A (May 28, 1996 Letter of Rolland A. Schmitten, NMFS, Ass't Administrator for Fisheries.) Mr. Schmitten's letter also asserts in a conclusory fashion it is "inappropriate and unnecessary for the Commonwealth of Massachusetts to apply for a small take permit," apparently on the premise that takings authorizations

Third, that the Defendants develop and prepare a proposal, to be submitted to the court on or before December 16, 1996, to restrict, modify or eliminate the use of fixed-fishing gear in coastal waters of Massachusetts listed as critical habitat for Northern Right whales in order to minimize the likelihood additional whales will actually be harmed by such gear.[46]

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are "issued to participants in commercial fisheries, rather than to a state licensing agency." *Id.* In order to crystallize the issues efficiently and formally, however, I will require that the Defendants make the applications, irrespective of the NMFS advisory opinion. It would appear unwieldly as an alternative to inundate NMFS with individual applications by commercial fisheries as a condition to obtaining a license from the Commonwealth. Moreover, it is by no means clear that the NMFS advisory position is well-founded. I note in this connection that the Plaintiff has just filed suit against NMFS, *Strahan v. Kramek, et al.*, Civil Action No. 96-11898-DPW, contending that, as with the Defendants in this case, NMFS has violated its duties under the ESA and MMPA.

[46] I note, for example, that the scientific affidavits suggest a number of proposed modifications, including the retrieval of ghost fishing gear from critical habitat areas, (see Mattila Aff. ¶ 16), and the attachment of noise makers to gillnets, (see Dorsey Aff. ¶ 41). I also note that the fishing industry in Massachusetts coastal waters is extensively regulated by NMFS, and by the New England Regional Fishery Management Council, under the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801 et seq., see also 50 C.F.R. pt. 601. In accordance with such regulation, several gillnet bans have been added to the Fishery Management Plan for the Northeast Multispecies Fishery, see generally 50 C.F.R. pt.

651, subpt. A. In March of 1994, NMFS amended the Fishery Management Plan to restrict the use of sink gillnets in Massachusetts waters. *See* 59 Fed.Reg. 9,872, 9,881 (Mar. 1, 1994). NMFS closed several areas to sink gillnets and/or other forms of fishing. "Closed Area I," see Figure 3 to 50 C.F.R. pt. 651, is closed to sink gillnets from February through May. 50 C.F.R. § 651.21(a), as amended by Framework 9, 60 Fed.Reg. 19,364, 19,376 (April 18, 1995). "Closed Area II" is closed to all fishing, except lobster and scallop fishing, from January through June. 50 C.F.R. § 651.21(b), as amended by 60 Fed.Reg. at 19,376. Sink gillnets may not be used in the "Northeast Closure Area," see Figure 4 of 50 C.F.R. pt. 651, from August 15 through September 13, in the "Mid- coast Closure Area" from November 1 through November 30, or in the "Massachusetts Bay Closure Area" from March 1 through March 30 of each fishing year. *See* 50 C.F.R. § 651.32(a). These provisions may be modified in accordance with certain "framework adjustment" procedures. *See* 50 C.F.R. § 651.32(b). Although the primary purpose of the gillnet regulations was to protect the Harbor Porpoise, see, e.g., 59 Fed.Reg. at 9,881, some consideration also was given to the needs of the Northern Right whale. In commenting on the proposed regulations, the Marine Mammal Commission suggested that the critical habitat areas for the Northern Right whales, which had been proposed but not adopted at the time, be used to define the closed areas. *Id.* NMFS responded: Much of the proposed critical habitat is already included in Closed Area I and the closure occurs at a time when right whales are present in the area. The Biological Opinion prepared for this amendment determined that Cape Cod Bay and the Great South Channel will not be adversely affected by the Amendment 5 measures. If the proposed critical habitat for

Fourth, the Defendants will be ordered to convene an Endangered Whale Working Group and to engage in substantive discussions with the Plaintiff, or his representative, as well as with other interested parties, regarding modifications of fixed-fishing gear and other measures to minimize harm to the Northern Right whales.[47]

The Endangered Whale Working Group should loosely be modeled after the Take Reduction Teams[48] and the Regional

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right whales becomes final, it may be appropriate at that time to consider such a change under the framework provisions, in subpart C. The exception to this would be Cape Cod Bay, which is under the Commonwealth of Massachusetts' jurisdiction. *Id.* (emphasis added). Thus, the Defendants should also consider whether areas under its jurisdiction should be closed to certain types of fishing gear during appropriate times of the year.

[47] I note in this connection the apparent success of the Harbor Porpoise Working Group, which included scientists, state and federal agencies, environmentalists, gillnetters, and resource managers. (Dorsey Aff. ¶¶ 37-42.)

[48] The MMPA requires that stock assessment reports of marine mammal species be prepared by the Secretary [of the department in which the National Oceanic and Atmospheric Administration is operated] in consultation with the appropriate regional scientific review group. *See* 16 U.S.C. § 1386(a). When a final assessment report is issued for a strategic stock, defined as a species which is listed as a threatened species or endangered species under the Endangered Species Act, *see* 16 U.S.C. § 1362(19)(C), the Secretary is to establish a Take Reduction Team within 30 days. *See* 16 U.S.C. § 1387(6)(A).

Scientific Review Groups[49] required by the MMPA. Membership must be approved by the Court. The Plaintiff shall nominate one member, amicus curiae shall nominate one member, Defendants will nominate three members, and two members shall be nominated jointly by Defendants and Plaintiff after consultation with and reflecting the interests of local marine biologists, e.g., the Center For Coastal Studies, and commercial fishing representatives.

In fashioning this remedy, I note that it is appropriate to afford the Defendants the opportunity to complete the administrative process that Congress envisioned in allowing incidental takes of endangered species, without influencing that process by issuing a ban on gillnets or lobster gear at this time. On the other hand, because sufficient evidence has been provided to demonstrate that endangered whales have been and will continue to be at great risk of becoming entangled in 1996, I can no longer wait until the appropriate federal agencies decide whether to grant the Defendants any take permit before initiating a process needed to resolve the complicated factual questions surrounding the protection of endangered whales. Because I "have no expert knowledge on the subject of endangered species", *see TVA v. Hill*, 437 U.S. at 194, 98 S.Ct. at 2301-02, it is appropriate to allow those interested parties

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[49] Regional Scientific Review Groups ("RSRG") are to consist of "individuals with expertise in marine mammal biology and ecology, population dynamics and modeling, [and] commercial fishing technology and practices...." 16 U.S.C. § 1386(d). Moreover, to the extent possible, the RSRG should represent "a balanced representation of viewpoints...." *Id.*

with such expertise to develop the measures designed to protect endangered whales in the first instance.

I therefore order that the Working Group here ordered be organized on an expedited schedule. Nominations for the Working Group's composition shall be submitted to the Court for approval no later than October 18, 1996. At that time, a tentative schedule of and agenda for meetings will also be submitted to the court by Defendants. Meetings should start forthwith upon approval of membership by the Court. The Defendants will be responsible for keeping detailed minutes of the Working Group's meetings and will submit them, together with a summary status report, to the Court at regular intervals to be determined at a later date.

VII. CONCLUSION

For the reasons set forth more fully above, the Defendants' motions for summary judgment have been DENIED as to Counts I and II and ALLOWED as to Count IV; the Motion to Dismiss has been ALLOWED as to Count III; and interlocutory relief is GRANTED to the extent reflected in the ORDER issued this day.

ORDER

In accordance with the Memorandum issued this day, it is hereby ORDERED

(1) That the Defendants shall apply for an incidental take permit from NMFS on or before October 18, 1996, *see* 16

U.S.C. § 1539(a), for Northern Right whales;

(2) That the Defendants shall apply for a permit under the Marine Mammal Protection Act on or before October 18, 1996, *see* 16 U.S.C. § 1387, for Northern Right whales;

(3) That the Defendants shall develop and prepare a proposal, to be submitted to the Court on or before December 16, 1996, to restrict, modify or eliminate the use of fixed-fishing gear in coastal waters of Massachusetts listed as critical habitat for Northern Right whales;

(4) That the Defendants shall convene an Endangered Whale Working Group to engage into substantive discussions with the Plaintiff, or his representative, as well as with other interested parties, regarding modifications of fixed- fishing gear and other measures to minimize actual harm to Northern Right whales; and it is further ORDERED:

(a) That the membership shall be subject to approval by the Court;

(b) That Plaintiff shall nominate one member, amicus curiae shall nominate one member, Defendants shall nominate three members, and two or more members shall be nominated jointly by Defendants and Plaintiff after consultation with and reflecting the interests of local marine biologists and commercial fishing representatives; and

(c) The parties shall submit their nominations to the Court on or before October 18, 1996.

APPENDIX - C

APPENDIX C

Richard Max STRAHAN, Plaintiff-Appellee,

v.

Trudy COXE, Secretary of Massachusetts Executive Office of Environmental Affairs, et al., Defendants-Appellants.

Richard Max STRAHAN, Plaintiff-Appellant,

v.

Trudy COXE, Secretary of Massachusetts Executive Office of Environmental Affairs, et al., Defendants-Appellees.

No. 96-2063.

United States Court of Appeals,
First Circuit.

Before TORRUELLA, Chief Judge, CAMPBELL, Senior Circuit Judge, SELYA, BOUDIN, STAHL, and LYNCH, Circuit Judges.

ORDER OF THE COURT

Entered: December 8, 1997

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the

judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc filed by appellants be denied.

By The Court:

PHOEBE D. MORSE, Clerk

Supreme Court, U.S.
FILED
APR 8 1998
CLERK

(3)

No. 97-1485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PHILIP COATES, DIRECTOR OF THE MASSACHUSETTS DIVISION OF MARINE FISHERIES, *et al.*,
Petitioners,

v.

RICHARD MAX STRAHAN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

AMICUS CURIAE BRIEF OF AMERICAN FOREST & PAPER ASSOCIATION, NATIONAL ASSOCIATION OF HOME BUILDERS, NORTHWEST FOREST RESOURCE COUNCIL, SOUTHERN TIMBER COUNCIL, AND S.D.S. LUMBER COMPANY IN SUPPORT OF THE PETITION

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INTEREST OF *AMICI CURIAE*

Amici represent the forest products and home construction sectors of the economy.[1] For several reasons, *amici* are profoundly interested in and affected by the Endangered Species Act ("ESA") issues in this case. *Amici*'s members' business activities are frequently said to "take" ESA-listed wildlife. Thus, they have a substantial interest in questions about the kind of action -- or, in this case, *inaction* -- that creates liability for a "take" under ESA § 9, 16 U.S.C. § 1538(a)(1). Here, state officials were held responsible for a "take" by virtue of their failure to provide greater *affirmative protection* to an endangered whale species when the State issued fishing licenses. This expansive notion of "take" has important implications for *amici* and their members.

Moreover, *amici*'s members' business activities are subject to a variety of state regulatory schemes. State and local officials, threatened with injunctions and possible criminal or civil liability under the liability principles established by the First Circuit, will often deny the permits required by *amici*'s members. The chilling effect that the decision below has on the issuance of building, grading, timber harvesting, and other permits is of grave concern to *amici*.

Further, the decision below requires States to impose broad regulatory restrictions to reduce or eliminate risks that private activities may "take" listed wildlife species. Thus, regulated persons will be subject not only to the ESA's ban on "takes," but also and more immediately to broader state prophylactic rules. By prompting state officials to devise and implement prophylactic rules against third parties to protect the officials

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[1] Letters indicating the parties' consent to the filing of this *amicus curiae* brief have been filed with the Clerk of the Court. Pursuant to this Court's Rule 37.6, *amici* certify that counsel for a party did not author this brief in whole or in part and that no person other than *amici* made a monetary contribution to the preparation of this brief.

from "take" liability, the First Circuit has created a system that leads to *over-regulation* beyond "take" by state and local permit-granting agencies. Such over-regulation is an issue of significance for *amici*.

The First Circuit's view that a State may be compelled to regulate to advance federal ESA objectives is inconsistent with both the ESA itself and the Tenth Amendment. Petitioners focus primarily on Tenth Amendment and ESA "proximate cause" issues. *Amici* will address the basic change to the regulatory framework wrought by imposing this type of liability on state officials. *Amici* also suggest that the Petition (particularly its first question) encompasses the following formulation, which focuses on the conduct constituting an ESA "take":

> In light of the Tenth Amendment, does a State commit a "take" or any other enjoinable violation of the ESA where the State fails to use its regulatory program to provide affirmative protection that eliminates or minimizes the risk that the activities of regulated persons or entities might "take" listed wildlife?

Finally, *amici* note that regulated businesses are pervasively affected by the order of the court below, yet might have little ability to mount an effective challenge, other than in connection with this Petition. Thus, their participation as *amici* is especially important.[2]

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[2] To illustrate: The court below directed negotiations between plaintiff and defendants. The product of such negotiations is often an agreement by the State to *increase* regulation. The regulated businesses would bear the burden of that increased "voluntary" regulation by the State. Yet, regulated entities will likely lack standing to complain later that the regulations adopted by the State, under this type of federalized environmental pressure, were prompted in a manner inconsistent with the

(continued...)

Amici therefore file this brief to address important issues that may not be fully apparent on initial review of the Petition.

STATEMENT OF THE CASE

Amici agree with Petitioners' statement of the case and would add the following points of emphasis.

1. The Endangered Species Act assigns protection to members of animal or plant species listed, pursuant to a rulemaking process, as "endangered" or "threatened" (collectively, "listed species"). 16 U.S.C. § 1533.

"Federal agencies," not States or private entities, have affirmative duties to assist in the "conservation" or recovery of listed species. 16 U.S.C. §§ 1531(c), 1533(f), 1536(a)(1). Similarly, only federal agencies have the substantive duty to avoid jeopardizing the continued existence of a listed species and the procedural duty of consultation under ESA § 7(a)(2). *Id.* § 1536(a)(2).

ESA § 6 authorizes use of the "carrot" of federal funding to encourage, but not force, States to use their laws to advance ESA objectives. If the State is certified as having an "adequate and active program for the conservation of" listed species, up to 90% of the State's program to protect listed species will be federally funded as part of a cooperative agreement. *Id.* § 1535(c) and (d); *see* 50 C.F.R. Part 225. In the cooperative agreement with Massachusetts, the National

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[2](...continued)
Tenth Amendment, or even that they go beyond the requirements of the ESA. Thus, *amici* have a special interest in presenting their views and in urging that the Court grant the Petition at this time.

Marine Fisheries Service ("NMFS")[3] did *not* require the measures that were included in the district court's injunction. *See* Record Appendix in Nos. 96-2063 and 96-2345 at 207-10.

2. ESA § 9 makes it "unlawful for any person subject to the jurisdiction of the United States" to "take any such species [an "endangered species of fish or wildlife"] within the United States or the territorial sea of the United States." 16 U.S.C. § 1538(a)(1)(B). By regulatory extensions, it is also unlawful to "take" most *threatened* fish or wildlife species. *See id.* §§ 1533(f), 1538(a)(1)(e); 50 C.F.R. § 17.3 and Part 227. Thus, the "take" prohibition applies to what are commonly referred to as "listed wildlife species."

The ESA defines "take" in terms of active conduct, not inaction or failure to provide protection: to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" listed wildlife or "to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). "Harm" has been defined to include a habitat modification action (e.g., cutting trees, capturing by nets), *if* that action "actually kills or injures wildlife."

> **Harm** in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3. In addition, ESA § 9(g) makes it "unlawful for any person subject to the jurisdiction of the United States

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[3] NMFS, within the Department of Commerce, has jurisdiction over listed marine species such as the endangered Northern Right whale, while the U.S. Fish and Wildlife Service ("FWS") has jurisdiction over other listed species. *See* 16 U.S.C. § 1532(15); 50 C.F.R. §§ 222.23(a), 227.4. NMFS and FWS will be referred to as the "Services."

to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in this section," such as "take." 16 U.S.C. § 1538(g).

3. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), this Court rejected a facial challenge to the "harm" regulation. In *Sweet Home*, all members of the Court agreed that "take" in the ESA "incorporate[s] ordinary requirements of proximate causation and foreseeability." *Id.* at 697 n.9, 700 n.13 (majority opinion); *see id.* at 712 (O'Connor, J., concurring) and 732 (Scalia, J., dissenting). The Solicitor General's briefs in *Sweet Home* had advised that "take" is limited by "principles of proximate causation" to exclude "remote effect[s]" where there are "intervening acts" by human actors.[4] The Department of Justice had earlier argued unsuccessfully in a different case that a *federal agency* (the Environmental Protection Agency) *should not be liable for a "take"* if, following its registration of a pesticide, a private person did "take" listed wildlife by using that pesticide. *See Defenders of Wildlife v. Administrator, EPA*, 688 F. Supp. 1334, 1353-54 (D. Minn. 1988), *aff'd*, 882 F.2d 1294, 1301 (8th Cir. 1989).

4. This case addresses whether Massachusetts violates the ESA when it issues fishing licenses, if the activities of private fishermen who receive those licenses might injure endangered Northern Right whales. The district court found at summary judgment, and the First Circuit affirmed, that the

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[4] Reply Br. for Petitioners at 4 n.4 in *Sweet Home*, No. 94-859 (1995); *see* Opening Br. at 41-50. *See generally* James C. Kilbourne, *The Endangered Species Act Under The Microscope: A Closeup Look From A Litigator's Perspective*, 21 ENVTL. L. 499, 583-84 (1991); Steven P. Quarles *et al.*, Sweet Home *and the Narrowing of Wildlife "Take" Under Section 9 of the Endangered Species Act*, ENVTL. L. REP. (Envtl. L. Inst.) 10003, 10006-13 (Jan. 1996).

Commonwealth was the "proximate cause" of ESA § 9(a)(1) "takes" (or, perhaps, "caused" ESA violations under ESA § 9(g)). Pet. App. A-15 to 18, B-3, B-48 to 63.

Whale "entanglement in fishing gear is relatively infrequent" and whales often "survive the entanglement." Pet. App. B-54. There was evidence of "eleven occasions on which Northern Right whales had been found entangled in fishing gear in Massachusetts waters between 1978 and 1995." Pet. App. A-20. One conservative estimate is that fishermen have cast their nets and dropped their lines 100,000 times in Massachusetts waters during that 17-year period. Even assuming that each entanglement was a "take," 11 "takes" means there was a probability of .00011 that any one fishing activity would "take" an endangered whale. The low probability of "take" did not deter the courts below from granting a program-wide injunction.

5. Massachusetts' licensing program did *not* purport to authorize the licensee-fishermen to violate the ESA. In fact, the State ESA prohibits all persons, including State licensees, from taking species "listed under the Federal Endangered Species Act." MASS. GEN. LAWS ch. 131A, § 2. In addition, the state agency has adopted numerous measures to protect the endangered whale. *See* Pet. at 12-15, 23. Thus, the agency did not solicit "take" or direct that "takes" occur.

Instead, the Commonwealth's alleged violation of law lay in its failure to supplement the "take" prohibition of the ESA with its own broad regulatory prohibition to help ensure that licensee-fishermen do not violate the ESA.

6. This case came to the court of appeals on review of an order that denied the State's motion for summary judgment on the ESA and Tenth Amendment grounds, which are again squarely presented in the Petition, and that granted a preliminary injunction. Pet. App. B-3, B-4 to 43, B-48 to 63.

While an "ordinary" preliminary injunction case might not present issues suitable for review, the injunction here imposes immediate affirmative obligations on the State in its sovereign capacity to begin implementing processes to provide further regulatory protection to the whale species. The injunction requires state regulatory action to "minimize the likelihood additional whales will actually be harmed by such gear," requires "substantive discussions with the Plaintiff" on the content of those regulations, and requires the Commonwealth to "apply for an incidental take permit" under 16 U.S.C. § 1539(a) and bear the associated costs. Pet. App. A-2 to 3. Indeed, the court stated that the State's duty goes beyond minimizing the risk of "take" to *eliminating all risks* of "take." *Id.* at A-22 (State "efforts to minimize such entanglements are irrelevant;" the State was correctly enjoined "to prevent the taking of Northern Right whales"), A-37 ("ensuring that any violation would end").

The injunction imposes upon a State a series of affirmative steps -- such as obligations to seek an incidental take permit, to enter into negotiations with Plaintiff, and to develop regulations -- designed, in effect, to moot the case by agreement between the parties before it reaches final judgment. If the case is mooted by virtue of State acquiescence, the regulated community will have to bear the effects of the State's over-regulation.

REASONS FOR GRANTING THE WRIT

By conscripting States to use their regulatory programs to affirmatively protect listed species, the decision below significantly extends the ESA's regulatory reach in a manner not envisioned by Congress. The odd result reached by the First Circuit -- holding the State responsible for a wildlife "take" for failure to better guard against possible "takes" by the actions of private parties -- turns the ESA concept of a

taking of wildlife on its head. Moreover, any interpretation of the ESA that requires a State to use its regulatory authority to advance federal ESA objectives offends this Court's Tenth Amendment jurisprudence. There is *every* reason to construe the ESA, under its own terms and in light of the Tenth Amendment, as precluding the result reached below.

Amici will address the nature of the lower court's ruling (¶ 1); the transformation of the ESA regulatory structure wrought by that ruling (¶ 2); the Tenth Amendment issue raised by that ruling (¶ 3) the proximate cause defect in the ruling (¶ 4); the ruling's inconsistency with the "take" definition set forth in the ESA (¶ 5); and the reasons why neither the *pro se* status of the plaintiff nor the posture of this case should deter the Court from granting the Petition (¶ 6).

1. The First Circuit's approach compels States to enforce the federal ESA by creating an enjoinable ESA violation where state officials fail to use their authorities to effectively eliminate the risk of "take" from the actions of private party permittees. Pet. App. A-2 to 3, A-15 to 18, A-22, A-37. Under this view, state and local officials are threatened with potential civil and criminal liability for violating the ESA unless they structure their regulatory programs to guard against the possibility that private parties will take protected species. *See* 16 U.S.C. § 1540(a) and (b).

Thus, the rulings and injunction of the courts below tell a State how to exercise its sovereign authority -- *i.e.*, its sovereign prerogative to make law that governs the conduct of private citizens. The First Circuit's theory that the State can be enjoined to take affirmative actions to protect listed wildlife presumably would also require the State to police the regulatory restrictions vigorously -- or else be held liable for "takes" for failure to halt the violators.

2. The regulatory framework that results from the First Circuit's decision is inconsistent with the ESA.

As enacted by Congress, the ESA creates direct federal prohibitions on the "take" of listed wildlife by any "person," including private parties who hold state licenses or are otherwise regulated by a State. 16 U.S.C. §§ 1532(13), 1538(a)(1)(B) and (G). The Services and the Department of Justice are granted authority to enforce the ESA; the ESA does not enlist States and other non-federal governmental entities as ESA policemen. *Id.* § 1540(a)-(f). By conscripting States to enforce the ESA, the decision below also is inconsistent with the voluntary approach of ESA § 6, which uses the familiar "carrot" of federal funding to encourage States to use their programs to assist in protecting listed species. *Id.* § 1535(c) and (d).

Further, under the ESA as enacted, a person accused of a "take" may challenge the foundations for the claim of "take." Under the First Circuit's approach, however, the person is more immediately affected by broader state limitations on permits and may not be able to challenge the State's denial of a permit on grounds that the permitted activity would not cause an ESA "take." The commandeering of state regulatory programs to create broad prophylactics against "takes" is inconsistent with the ESA's framework.

This particular controversy concerning the right whale is in federal court only because the Commonwealth took the unusual step of resisting demands to regulate. The far more likely scenario is for state officials, threatened with liability, to "voluntarily" acquiesce and adopt the regulations.[5] Threatened

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[5] For example, FWS issued Northern Spotted Owl Guidelines that were designed to inform timberland owners of the timber harvesting (continued...)

with injunctions and possible criminal or civil liability (or even just bad publicity), state government officials can be expected to acquiesce in demands to structure their regulatory programs to avoid risks that regulated parties would "take" listed wildlife. Local officials "listen when told they may go to jail for issuing a grading permit, notwithstanding the considerable legal uncertainty whether USFWS would have the authority to prosecute a city official for approving development." Robert D. Thornton, *Takings Under Endangered Species Act Section 9*, NATURAL RESOURCES & ENVT. 7, 51 (Spring 1990).

Thus, expansive ESA liability creates a broader *in terrorem* effect on state and local officials, pressuring them to regulate broadly and with bright-line rules. States are likely to create broad rules banning a wide range of productive economic conduct, affecting many people, in order to eliminate the possibility that "takes" will occur in a small number of

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[5](...continued)
restrictions they could follow to avoid any prosecution for "take" of the threatened owl. In many States, commercial timber harvesting on private lands requires a permit from the state forestry agency. The advisory Guidelines became binding elements of state law when FWS informed the States that:

> Their approval of timber harvesting activities that resulted in "take" under the Guidelines could render them liable on a complicity theory. . . . To avoid liability, the states have had to assure that their review and permitting processes do no allow activities that would violate the Guidelines. In this way, the federal agency has in practical effect bound the states to follow the Guidelines. Further, it has conscripted the states as its regulatory agents, to force the nonlegislatively promulgated Guidelines upon private parties.

Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, And The Like - Should Federal Agencies Use Them To Bind The Public?*, 41 DUKE L.J. 1311, 1371 (1992).

instances.[6] In sum, the First Circuit's liability theory creates tremendous pressure to over-regulate.

Further, persons subject to the state-adopted prophylactic regulations may have no opportunity to question the underlying ESA foundations of the regulation that limits their activities. In other words, a fisherman who seeks to engage in his or her trade during the period prohibited by the State will be held liable for violating the broader state regulation. Any attempt by the fisherman to prove that his or her activities have not "taken" any listed wildlife species would be irrelevant to the violation charged.

3. *Amici* agree with Petitioners' analysis of the Tenth Amendment issues. Compelling a State to negotiate and adopt regulations strikes at the heart of a State's sovereignty.

We can well assume that the First Circuit is correct that there is a Tenth Amendment difference between holding state officials liable when *their own* (usually proprietary) activities violate a federal statute and requiring States to enforce federal regulations. *See* Pet. App. A-27 to 33. However, when a court purports to hold state officials liable for violation of a

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[6] *See* Pet. at 12-13. Yet, even a "significant risk of harm" should not authorize an injunction. *American Bald Eagle v. Bhatti*, 9 F.3d 163, 166 n.5 (1st Cir. 1993). "[C]ourts have correctly interpreted the "harm" prohibition not to extend to an activity that only potentially, as opposed to actually, causes (or will cause) harm." Br. for Petitioners at 46 in *Sweet Home*, No. 94-859 (1995). There are "strong arguments that activities that cause minimal . . . harm will not violate the Act." *Sweet Home*, 515 U.S. at 699. If the risk tolerance level for "take" is near zero, as the court below found, the area off-limits to development becomes larger and the impact on economic activities becomes more substantial. For example, the Working Group established pursuant to the injunction "agreed that zero risk was impossible to achieve in Critical Habitat without a complete prohibition on fixed gear 12 months of the year." Record Appendix in Nos. 96-2063 and 96-2345 at 376.

federal statute for failing to structure state regulatory programs -- clearly an exercise of sovereign authority -- to further federal objectives, then any such distinction disappears.

The ESA interpretation of the court below effectively "'commandeer[s] state governments into service of federal regulatory purposes'" in a manner "inconsistent with the Constitution's division of authority between federal and state governments." *New York v. United States*, 505 U.S. 144, 175 (1992). Just as Congress could not make it a violation of federal law for a state sheriff to decline to conduct a background check on the third-party sale of a handgun (*Printz v. United States*, 117 S. Ct. 2365, 2379-84 (1997)), neither Congress nor the First Circuit can make it an ESA violation for a State to decline to enforce federal ESA "take" concepts against third parties.

Indeed, if state officials are liable under the ESA for failing to impose permit conditions to restrict the questioned fishing practices, the State also likely would be liable if it failed to appropriate sufficient funds and deploy enough personnel to enforce such bars. The First Circuit's theory of ESA liability for state officials cuts to the core of state sovereignty in precisely the manner forbidden by this Court's cases.

Amici suggest that the ESA should *not* be read in a manner that would raise these Tenth Amendment concerns. Petitioners (at 25-28) stress the proximate cause limitation, which we agree with and discuss briefly below. We then describe why the ESA definition of "take" simply cannot reach the kind of failure to protect wildlife at issue here.

4. *Amici* agree with Petitioners that the proximate cause limitation, properly applied, ought to mean that a state agency does not violate the ESA when it merely fails to implement licensing requirements that are stringent enough to prevent any private person from ever "taking" listed wildlife.

The concept of "take" is limited by "ordinary principles of proximate causation." *Sweet Home*, 515 U.S. at 696-97 n.9, 700 n.13, 712-13. One would not ordinarily conceive of a state employee who issues a facially neutral license while sitting in an office as being the proximate cause of a wildlife injury. The licensee's independent environment-disturbing activity -- here, a fisherman who casts his net near an endangered whale -- is the intervening human cause and, indeed, the proximate cause of any "take" of listed wildlife. This would seem particularly clear where the State has directly prohibited such "takes" under other provisions of its own law.

The Department of Justice has historically supported this position that governmental "regulatory authorization of actions by third parties cannot constitute a taking under the ESA." Brief of EPA Appellants at 26, *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989) (No. 88-5242). The Department argued that EPA's regulatory registration of a pesticide could not constitute a "take" as a matter of law based on the proximate cause logic that the "independent actions of third parties . . . are necessary before any adverse effects to endangered species will occur." *Id.* at 31. *See also* page 5, above; *National Wildlife Fed'n v. National Park Serv.*, 669 F. Supp. 384, 392 (D. Wyo. 1987). Thus, the First Circuit's result is contrary to the historic interpretation of the ESA advanced by the United States.

The First Circuit cited several lower court cases (such as *Defenders of Wildlife v. EPA*) that found government agencies liable because they had an opportunity to act to reduce the likelihood of private "take." *See* Pet. App. A-15 to 16. In the climate of pervasive regulation prevailing today, if this remote form of causation suffices to create liability, government agencies at both State and federal levels could be found liable in numerous situations under the ESA and many other statutes. *See* Pet. at 21-22.

In terms of causation, there is no obvious difference between issuing a license that fails to set forth certain restrictions on the one hand, and failing to promulgate or enforce regulations that would have better protected wildlife on the other. Thus, the liability rule approved by the First Circuit cannot be limited to licenses and permits. If a broad notion of causation suffices, remotely connected private "persons" also unfairly face ESA liability, such as banks issuing loans for development activities.[7]

It is true that expansive notions of causation have taken hold in the common law. In certain circumstances, a landlord might, under state law, be held liable for a burglar's assault on a tenant based on the landlord's failure to adequately secure the building. Of course, such liability must be predicated on a finding that the landlord had an *affirmative duty* to provide such protection. The First Circuit cited no source for a finding that the State owed such an affirmative duty to guarantee against small risks of "take." This Court has been reluctant to conclude that state officials, who must rely on public funds to finance any efforts at affirmative protection, are liable for generalized failures to provide affirmative

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[7] The same "take" avoidance standards theoretically apply to all governmental and private "persons." 16 U.S.C. §§ 1532(13), 1538(a)(1) and (g); 50 C.F.R. § 17.3. Consider the plight of a landowner who does not prevent the public from hunting deer or ducks on private lands. Very infrequently, hunters kill grizzly bears or other listed wildlife by mistake. *See Swan View Coalition, Inc. v. Turner*, 824 F. Supp. 923, 939-40 (D. Mont. 1992). If the landowner is liable for all risks of "take" from invitee or trespasser hunters, many landowners will react by prohibiting hunting and other forms of recreation on their lands, and may have to incur additional costs in policing their lands. Moreover, if failing to provide the best affirmative protection is "take," the landowner may be enjoined not just to forego productive land uses that alter habitat but also to spend money to provide the best habitat for listed wildlife.

protection. *See DeShaney v. Winnebago County Soc. Servs. Dept.*, 489 U.S. 189, 199-200 (1989) (discussing the limited circumstances under which an affirmative duty to protect may be imposed).

5. The answer to the question whether the Commonwealth had an affirmative obligation to incorporate these protections in its regulatory scheme may be found in the ESA definition of "take." The panel's view that a State's failure to affirmatively provide the best possible protection for endangered whales is "take" cannot be squared with the ESA definition of "take."

The ESA defines "take" in terms of active conduct: to "harass, harm, hunt," etc. or to "attempt to engage in any such conduct." 16 U.S.C. § 1532(19). The State's inaction, or the failure to provide affirmative protection, does not fit within that definition. *See Sweet Home*, 515 U.S. at 698 n.11 ("deliberate actions"), 719-20 (Scalia, dissenting) ("take" definition requires "affirmative acts").

Even the broadest term in the "take" definition -- "harm" -- makes unlawful only "the act which actually kills or injures wildlife." 50 C.F.R. § 17.3. As the Court held in *Sweet Home*, such acts may include acts of "habitat modification" that indirectly (but without intervening human action) kill or injure wildlife. 515 U.S. at 696-98 (majority opinion), 712 (O'Connor, J., concurring that "parties should be liable under § 1540(a)(1) only if their habitat-modifying actions proximately cause death or injury to protected animals"). The State did not engage in any such affirmative, environment-disturbing act. "Defendants do not place gill nets and lobster gear in coastal waters." Pet. App. B-39. A State's regulatory actions, like EPA's, should not constitute "take":

> As a matter of law, however, EPA's actions in registering pesticides under FIFRA cannot be held to constitute takings

> under the ESA. The act of EPA in registering the pesticides does not "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" protected wildlife.

Brief of EPA Appellants at 27, *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989) (No. 88-5242).

There is, in any event, a clear difference between finding that an affirmative act harming a listed species by destroying its habitat can qualify as a "take" (as in *Sweet Home*) and concluding that a *failure to affirmatively protect* listed species or their habitat is a "take" (which is the situation presented here). *See Sweet Home*, 515 U.S. at 711, 713-14 (majority opinion), 716-20 (O'Connor, J., concurring, and Scalia, J., dissenting). Here, the only affirmative act appears to be the issuance of a facially neutral license, while the ESA violation consisted of State *inaction* in not regulating private activities more strictly.

Listed species would not be left unprotected if States and others are freed of attenuated liability for "take." Protection against future "take," remedies for "take," and incentives against "take" still will be provided by *suits against the actor whose actions do constitute a "take"* for injunctions, civil penalties, or criminal sanctions. *See* 16 U.S.C. § 1540(a), (b), (e)(6), (g).

6. Finally, neither Mr. Strahan's *pro se* status nor the alleged "interlocutory" nature of the opinions below should deter this Court from granting review.

a. Both courts below found decisive the affidavit evidence and arguments presented by the Conservation Law Foundation ("CLF"). Pet. App. A-20 to 21, A-36, B-7, B-53 to 55, B-67. Though nominally an *amicus curiae*, CLF's submission of evidence and distinct legal theories makes it more like a party. *See* Pet. at 5. CLF is a skilled appellate

advocate, having authored briefs to this Court and other courts on several occasions. Should Mr. Strahan lack counsel, counsel could be appointed. Mr. Strahan's *pro se* status should not prevent the Court from addressing what appear to be clear Tenth Amendment violations and misreadings of the ESA -- particularly in light of the injunction granted below.

b. This Court often has occasion to review interlocutory orders where there are "important and clear-cut issue[s] of law." ROBERT A. STERN *ET AL.*, SUPREME COURT PRACTICE 196 (7th ed. 1993); *see* Pet. at 16. Although this case was before the First Circuit on review of a "preliminary injunction" (Pet. App. A-7), the issues presented here, involving the Tenth Amendment and the scope of the ESA, were addressed and resolved by the district court and court of appeals squarely on their legal merits. Those courts have rejected at *summary judgment* the State's Tenth Amendment defense and position that it was not liable for an ESA violation. Pet. App. A-15 to 18, A-25 to 34, B-3, B-40 to 43, B-48 to 63. Thus, those fully ventilated issues are ripe for this Court's review.

The injunction is quite unusual in that it is not strictly prohibitory. To the contrary, the injunction imposes upon the Commonwealth a series of affirmative steps -- such as obligations to seek an incidental take permit, to enter into negotiations with Plaintiff, and to develop regulations -- that were designed, in effect, to moot the case by agreement between the parties before it reaches final judgment. Since the State has been enjoined in a manner that violates the Tenth Amendment, review is appropriate.

Further, if the Commonwealth ultimately acquiesces in the ruling before final judgment by adopting the regulations or obtaining an incidental take permit -- as States often do when confronted with potential civil and criminal liability -- then the

regulated industry will be forced to bear the harsh consequences of such unjustified regulation, yet never have the opportunity to challenge it on ESA or Tenth Amendment grounds. The Court should resolve in this case these fundamental issues that bear significantly on both the scope of the ESA and the sovereignty of the States.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 8, 1998

No. 97-1485

Supreme Court, U.S.
FILED
APR 9 1998
CLERK

In The

Supreme Court of the United States

October Term, 1997

PHILIP COATES, DIRECTOR OF THE MASSACHUSETTS DIVISION OF MARINE FISHERIES, ET AL.,

Petitioners,

v.

RICHARD MAX STRAHAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

AMICI CURIAE BRIEF OF THE STATES OF CALIFORNIA, ALASKA, ARIZONA, GEORGIA, IDAHO, INDIANA, KANSAS, MAINE, MARYLAND, MISSISSIPPI, NEBRASKA, NEW HAMPSHIRE, NORTH CAROLINA, OHIO, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, AND THE GOVERNMENT OF GUAM IN SUPPORT OF THE PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court decree requiring a State to enact and enforce remedial wildlife protection measures to implement the federal Endangered Species Act ("ESA"), where federal officials specifically charged with implementing the ESA have themselves declined to enact such measures, violates the Tenth Amendment to the U.S. Constitution and related principles of federalism and intergovernmental comity.

2. Whether Massachusetts proximately "caused" the take of endangered whales, for purposes of the ESA, by issuing fishing permits to private fishermen whose fishing activities may result in entanglement of whales in their nets where: (a) Massachusetts does not itself conduct any fishing that resulted in the take of whales; (b) Massachusetts law expressly prohibits the take of any endangered whales; (c) Massachusetts regulates fishing gear to minimize the risk of any take of whales; and (d) the Federal Government could have, but declined to, adopt more stringent fishing restrictions under the ESA and the Marine Mammal Protection Act that could have further reduced or completely eliminated the risk of an illegal take of whales.

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AMICI CURIAE BRIEF

The States of California, Alaska, Arizona, Georgia, Idaho, Indiana, Kansas, Maine, Maryland, Mississippi, Nebraska, New Hampshire, North Carolina, Ohio, South Dakota, Tennessee, Utah, Virginia, and the Government of Guam, respectfully file this brief *amici curiae*, pursuant to Supreme Court Rule 37.4. The brief is submitted in support of the petition for certiorari filed in this case by the Commonwealth of Massachusetts.

INTEREST OF *AMICI CURIAE*

California and its sister states represent sovereign entities in our federal system. Each of the *amici* States has enacted its own set of regulatory programs, under its police power authority, to protect the health, safety and welfare of its citizens. Except to the very limited extent they are preempted by the federal government under the Supremacy Clause of the U.S. Constitution, these state regulatory programs constitute distinct governmental program, enacted and administered by the sovereign States.

The decision below threatens the very nature of this system of dual sovereignty. Plaintiffs below, unsuccessful in vindicating their policy views before Congress or federal regulators, instead brought a citizen suit in federal court. There they convinced a district judge – and ultimately the Court of Appeals – that the federal judiciary has the power to compel state officials to take affirmative steps to implement federal law that federal officials have deemed unnecessary, unwise or both. The implications of that ruling for *amici* States are both enormous and destructive. Left unreviewed, the decision below will no doubt encourage private citizens and federal officials alike to force States to carry out and implement federal programs that the federal government is itself unprepared to pursue.

Such a transfer of government functions, political accountability and attendant costs is both unconstitutional and unsound public policy.

The adverse effects of the decision below are already being felt around the nation. In Arizona, for example, federal wildlife officials – relying on the decision below – have threatened to hold State and local officials responsible for an illegal "take" of pygmy owls (a listed species under the ESA) if the state and local officials allow rezoning or issue building permits to landowners who then modify habitats suitable for the pygmy owl. (T. Davis, "Expect Suits If Pygmy Owl Habitat Hurt," *Ariz. Daily Sun*, p. 1B (Nov. 22, 1997).)

In the Pacific Northwest, federally-adopted guidelines under the ESA have been used to compel State officials to limit timber harvesting on private lands when the latter administer state permitting processes. Failure to do so, it is asserted, will render the States liable under the ESA on a complicity theory with private actors. Again, the net result is that States have been conscripted as the regulatory agencies of the federal government. (R. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1371 (1992).)

And in California, private parties have sued State and regional officials in federal court under the federal Clean Air Act (42 U.S.C. § 7401 et seq.) to compel, *inter alia*, the State to implement ozone emission standards advocated by those plaintiffs. (*Coalition for Clean Air, Inc. v. South Coast Air Quality Management Dist., et al.*, U.S.D.C., C.D. Cal. No. CV 97-6916.)

The potential, deleterious consequences of the decision below are by no means limited to the field of environmental regulation. The same reasoning employed by the district court and the Court of Appeals may be invoked to justify a similar shifting of regulatory responsibilities from the federal government to the States in such diverse subject areas as welfare, health care and law

enforcement. The lower courts' refusal to recognize established principles of federalism and intergovernmental comity, coupled with their strained application of causation principles to interpret federal remedial legislation, thus has nationwide ramifications, and threatens a broad array of regulatory programs administered by the States.

STATEMENT OF THE CASE

Amici States agree with Petitioner Massachusetts' Statement of the Case, and adopt it as if set forth in full herein. *Amici* stress only the following, specific points:

In this case, Northern Right whales, an animal species listed as endangered under the ESA (16 U.S.C. §§ 1531-1544), were deemed "taken" within the meaning of the ESA because they became entangled in the gillnets and lobster pot lines of private fishermen. The courts below found Massachusetts culpable for this whale "take" because it issued fishing permits to fishermen, and had adopted state regulations on the use of fishing gear. Massachusetts itself did not conduct any of the fishing that resulted in the take of whales. (Appendix to Petition ("Pet. App.") B-39.) Nor did Massachusetts *require* fishermen who received permits to fish. By issuing fishing permits, neither did Massachusetts purport to authorize any take of listed whales. To the contrary, Massachusetts law expressly *prohibits* the taking of any federally-listed species, including Northern Right whales. (Petition ("Pet.") 12.) Moreover, the undisputed purpose of Massachusetts' fishing gear regulations is to *minimize* the risk of whale entanglements and takes caused by fishermen.

Significantly, the federal government, through the National Marine Fisheries Service ("NMFS"), has broad authority under the Marine Mammal Protection Act ("MMPA," 16 U.S.C. §§ 1361-1421h) and the ESA (16 U.S.C. § 1540(f)) to impose additional or more stringent fishing gear restrictions than those of Massachusetts, or to ban fishing altogether to avoid any take of whales. (See Pet. App. A-5; A-13 to A-15; B-23 to B-26.) However,

NMFS has made a policy judgment *not* to adopt more stringent whale protection measures under the regulatory power conferred upon it by those two federal statutes. (See A-18, n.3; A-19 (noting that NMFS had declined to ban gillnet and lobster pot fishing in Cape Cod Bay).) Indeed, apparently it was only when plaintiff was unsuccessful in convincing *NMFS* to adopt the regulatory measures he advocates that plaintiff found it necessary to initiate the present litigation against Massachusetts to accomplish that objective indirectly.

REASONS FOR GRANTING THE PETITION

There are several reasons why certiorari should be granted under the established standards articulated in Supreme Court Rule 10. First, the decision below directly conflicts with recent decisions of this Court regarding the scope of the Tenth Amendment and related principles of federalism. Second, the Court of Appeals below seriously misconstrued principles of causation applicable under the ESA, and did so in a manner which is fundamentally inconsistent with the Court's recent decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); the Court should squarely resolve the ESA causation question now. Finally, the decision below, if left unreviewed, will have serious, negative consequences for all of the States – particularly as they relate to citizen suits brought against state officials and to questions of intergovernmental comity between the States and the federal government. These points are developed below, with particular reference to the constitutional and statutory issues presented in Massachusetts' petition for certiorari.

A. The Ruling Below Directly Conflicts With Recent Decisions of This Court Invoking Federalism Principles to Bar the Federal Government From Conscripting State Officers and Processes to Carry Out Federal Programs and Objectives.

The petition in this case calls upon the Court to once again "discer[n] the core of sovereignty retained by the States under the Tenth Amendment" and related principles of federalism. (*New York v. United States*, 505 U.S. 144, 159 (1992).) By compelling Massachusetts to take affirmative and unprecedented steps to implement the ESA, the tribunals below have ignored this Court's repeated admonition that "[t]he federal government may not compel the States to enact or administer a federal regulatory program." (*New York, supra*, 505 U.S. at 188; *Printz v. United States*, ___ U.S. ___, 117 S.Ct. 2365, 2383 (1997).) This conflict, and the grave consequences it portends for all the States, warrants the Court's grant of review.[1]

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[1] The extraordinary relief ordered by the district court similarly would appear to violate the Eleventh Amendment. States are generally immune from unconsented suits in the federal courts under the Eleventh Amendment, subject to the narrow exception to Eleventh Amendment immunity afforded under *Ex parte Young*, 209 U.S. 123 (1908). The extraordinary, open-ended and affirmative mandate imposed on Massachusetts state officials in this case appears to exceed by a substantial degree the proper scope of *Ex parte Young*. See *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S.Ct. 1114 (1996); *Idaho v. Coeur d'Alene Tribe of Idaho*, ___ U.S. ___, 117 S.Ct. 2028 (1997).

While the issue of Massachusetts' Eleventh Amendment immunity from suit was actively contested and adjudicated below, the question is not squarely presented in the petition for certiorari. Nonetheless, a State's immunity from suit under the Eleventh Amendment is jurisdictional, and may be raised at any stage of the litigation. *Edelman v. Jordan*, 415 U.S. 651, 678 (1974).

1. The First Circuit acknowledged, as it must, that "the commands of the Tenth Amendment apply to all branches of the federal government, including the federal courts." (Pet. App. at A-31.) This, of course, applies with equal force to the related principles of federalism that are implicated in this case. (See discussion at pp. 12-13, *infra*.) Similarly, the district court's efforts to justify its imposition of federal regulatory duties on Massachusetts as not requiring the Commonwealth "to modify its legislative process" are patently unavailing in light of *Printz, supra*. There the Court made it abundantly clear that it is no less offensive to federalism principles to commandeer a State's *regulatory* program than it is to dragoon its legislative process. (117 S.Ct. 2365, 2380-2381, 2384 ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program").) The lower courts' decree that Massachusetts adopt measures to enforce a federal regulatory program that federal regulators themselves declined to enact is at least as noxious to federalism principles as the statutory mandates struck down in *New York* and *Printz*. Such mandates are "fundamentally incompatible with our constitutional system of dual sovereignty." (*Printz, supra*, 117 S.Ct. at 2384.)

2. The affirmative mandate the district court imposed on Massachusetts in this case is startling in scope. This is perhaps best understood by comparing the terms of the lower court's mandatory injunction to regulatory measures that federal agencies are themselves expressly empowered to enact under the ESA.

The Court, similarly, may raise the jurisdictional issue *sua sponte*. *Arizonans for Official English v. Arizona*, ___ U.S. ___, 117 S.Ct. 1055, 1071 (1997).

While federal agencies only need ensure that their permitting does not cause jeopardy to the aggregate species population, the courts below directed Massachusetts to ensure that any fishing permit it issues does not create a risk of a take of a *single member of a listed species*. (See Pet. App. A-22.) While federal permit agencies need only consult with federal wildlife agencies under section 7 of the ESA, the district court ordered Massachusetts to set up a court-supervised advisory committee and engage in substantive discussions with the *private plaintiff* regarding changes to Massachusetts' state regulatory program; the district court will then review those changes to determine their adequacy in ensuring that program's legality under the ESA. (See Pet. App. A-3 (Massachusetts must convene an Endangered Whale Working Group and "engage in substantive discussions with the Plaintiff"); A-29 (Massachusetts to "form a working group and engage in substantive discussions toward rectifying [Massachusetts'] statutory violation with working group members whose membership is directed ultimately by the district court").)

There is simply no statutory basis in the ESA for such a "shadow" section 7 system for State permit programs, and no indication that Congress intended such intrusive supervision of the States' permit programs at the hands of private citizens. The lower courts' imposition on Massachusetts of these ad hoc, affirmative mandates finds no support in the ESA and violates basic constitutional precepts of intergovernmental comity.

3. As this Court aptly noted in *New York*, Congress has enacted numerous environmental statutes that expressly contemplate a shared federal-state enforcement role. (505 U.S. at 167-168.) These include the Clean Air Act, Clean Water Act, the Resource Conservation and Recovery Act, and the Coastal Zone Management Act. Those statutes reflect Congress' acknowledged power "to offer States

the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." (*Id.* at 167.)

The ESA, in contrast, is federal environmental legislation of a different kind. It is a so-called federal "lead" statute, in which enforcement authority is expressly imposed upon *federal* agencies: principally the U.S. Fish and Wildlife Service, (NMFS), and the U.S. Department of Justice. (See 16 U.S.C. § 1540.) The States, on the other hand, are not required to enforce the ESA.[2]

This is not to say that States have no role to play in exercising their independent police power authority to protect endangered plant and animal species. To the contrary, most States have enacted their own endangered species laws, which are designed to accomplish parallel objectives to the ESA, albeit through a distinct mix of State-crafted strategies and requirements. (See, e.g., Calif. Fish & Game Code § 2050 et seq. (California Endangered Species Act).)

Under these circumstances, the parameters and implications of the district court decree in this case are particularly offensive to federalism principles. The private plaintiff, having failed to convince the NMFS through the political process to enact the restrictions on commercial fishing he advocates, successfully importuned a federal court to impose those restrictions indirectly – by commandeering Massachusetts officials to modify their state regulatory program so as to implement plaintiff's objectives under the ESA. Rather than be

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[2] Congress did envision a role for States under the ESA, albeit a non-regulatory one. See, e.g., 16 U.S.C. § 1535, directing federal regulators to "cooperate to the maximum extent practicable with the States" in carrying out the ESA's objectives. See also, 16 U.S.C. § 1531(c)(2).

allowed to administer its own wildlife preservation program, Massachusetts has been forced by federal court decree to devise the very type of ad hoc measures that federal ESA regulators themselves previously rejected on policy grounds.

Such a result directly contravenes this Court's federalism jurisprudence. The decision below "purports to draft state law enforcement officers to participate . . . in the administration of a federally-enacted program." (*Printz, supra,* 117 S.Ct. at 2369.) That, in turn, "contradicts vital principles necessary to maintain . . . the federal balance." (*City of Boerne v. Flores,* ___ U.S. ___, 117 S.Ct. 2157, 2171 (1997).)

Quite simply, the lower court decree "'commandeer[s]' state governments into the service of federal regulatory purposes"; it is for that reason "inconsistent with the Constitution's division of authority between federal and state governments." (*New York, supra,* 505 U.S. at 175.)

4. Ironically, Massachusetts could have avoided liability under the ESA by simply declining to regulate commercial fishing at all. The district court expressly noted this anomalous result in its decision below. (Pet. App. at B-41-42.) The Commonwealth has, in effect, been penalized under the ESA for having taken affirmative, positive steps to protect wildlife resources within its boundaries. Simply stated, as a result of the decision below Massachusetts is in a worse legal position for having implemented a salutary state natural resource protection program than it would have been had the Commonwealth not exercised its police powers in this fashion at all. This contradicts established notions of cooperative federalism, and discourages States from acting as the "social laboratories" that Justice Brandeis urged them to be nearly 70 years ago. (*New State Ice Co. v.*

Liebermann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

5. The Court of Appeals grounded its ruling that no Tenth Amendment violation had occurred in major part on the startling holding that Massachusetts' benign program of fishing regulation was *preempted* by the ESA. (Pet. App. at A-33.) The Court of Appeals reasoned that by including States as parties subject to the ESA's prohibitions, Congress implicitly intended to preempt any action of a State inconsistent with and in violation of the ESA. (*Ibid.*) This construction of federal law could prevent States and local governments from adopting *any* regulation that authorizes third party activities that might conceivably cause harm to listed species, even if the State or local regulation is wholly benign in its objectives.

The First Circuit's reliance on preemption theory in this Tenth Amendment context does violence to the Court's precedents. Judicial consideration of the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by [federal law] unless that [is] the clear and manifest purpose of Congress." (*Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).) State law may be preempted if Congress has explicitly mandated the preemption of state law (*Shaw v. Delta Airlines, Inc.*, 462 U.S. 85, 95-100 (1983)), or if Congress has indicated an intent to "occupy the field of regulation," thereby displacing state laws on the same subject. (*Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).) In the absence of express language or congressional intent to occupy the field, state law may be preempted to the extent the latter actually conflicts with federal law, i.e., when "compliance with both federal and state regulations is a physical impossibility" (*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963); or when state law "stands as an obstacle to the

accomplishment and execution of the full purposes and objectives of Congress." (*Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).)

It is apparent from the language and structure of the ESA that Congress recognized and accommodated the continued operation of State laws regulating wildlife. Congress expressed no intention through the ESA of occupying the field of such regulations. To the contrary, the ESA only preempts state law that directly conflicts with the ESA. (16 U.S.C. § 1535(f).) A finding that Massachusetts' fishing regulations are preempted because they do not go far enough is simply inappropriate, because State and federal laws do not conflict, and Massachusetts' law is no obstacle to the accomplishment of federal objectives. Regulated persons can and must comply with both state and federal law on the subject.

Core principles of federalism dictate that courts proceed very cautiously in implying preemption of state regulations that relate to fundamental aspects of state sovereignty. Moreover, the Supremacy Clause does not lead to any requirement that States adopt, endorse or legislate to implement a federal regulatory program.

The courts below turned these basic principles on their head. Instead of recognizing that a State's exercise of its basic police power authority does not offend established Supremacy Clause principles, they grounded their rejection of Massachusetts' Tenth Amendment argument in principal part on the baseless conclusion that its benign regulatory program was preempted by federal standards that the United States had itself declined to adopt. This was fundamental error. As this Court has aptly noted in similar circumstances, "the Supremacy Clause merely brings us back to the question . . . whether laws conscripting state officials violate state sovereignty

and are thus not in accord with the Constitution." (*Printz, supra,* 117 S.Ct. at 2379.)

Similarly, the lower courts' preemption ruling is directly tied to their flawed view of causation principles under the ESA, discussed in part (B), below. Simply stated, one key reason no preemption exists here is that Massachusetts did not cause an illegal take under the ESA.

6. Both the decision below and Massachusetts' petition focus their constitutional discussion on the Tenth Amendment. The Tenth Amendment, however, is not the only cornerstone of federalism. Nor is it the sole constitutional provision implicated in this case. (See *Printz, supra,* 117 S.Ct. at 2379 n.13 ("the Tenth Amendment is [not] the exclusive textual source of protection for principles of federalism").)

The Court has repeatedly stressed that our system of dual sovereignty is reflected in numerous constitutional provisions. (*Id.* at 2370, 2376, 2379 n.13; *City of Boerne v. Flores, supra,* 117 S.Ct. at 2171; *Arizonans for Official English v. Arizona,* ___ U.S. ___, 117 S.Ct. 1055, 1073-1075; *New York, supra,* 505 U.S. at 181-182; *Gregory v. Ashcroft,* 501 U.S. 452, 457 (1991).) This larger orbit of federalism principles is similarly contravened by the extraordinary dictates of the decisions below.

Just last Term, the Court counselled: "The Constitution contemplates that a State's government will represent and remain accountable to its own citizens." (*Printz, supra,* at 2377.) It is those broader constitutional precepts, and not simply the Tenth Amendment, that make "clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." (*Id.* at 2380.) The grave consequences of the lower courts' contrary conclusion, for both Massachusetts and its sister States, warrant the Court's grant of certiorari in this case.

B. The Court Should Grant Review Because Massachusetts' Regulation of Fishermen Does Not Make Massachusetts the "Cause" of Whale "Takes" by Third Parties Under the Endangered Species Act.

The Court of Appeals' wholesale disregard of this Court's federalism precedents is particularly unfortunate in light of the fact that the courts below need not have confronted the constitutional issues at all. This is because the lower courts similarly erred in interpreting the statutory mandates of the ESA as they affect Massachusetts. Had those courts properly applied this Court's recent decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon ("Sweet Home")*, 515 U.S. 687 (1995), it would never have been necessary to reach the constitutional question.

The Court should grant review to resolve continuing confusion among the lower courts over the proper causation standard for a "take" under the ESA. The Court also should grant review because of the highly intrusive impact of the decision below upon States as regulators of their citizens. Virtually every State licenses or issues permits for a wide range of private activities (like fishing, timber harvesting, water diversions, land grading, construction activities, etc.). These private activities inevitably pose some risk of a take of listed species under the ESA. Per the First Circuit's reasoning, every State now will be liable for any take resulting from those private activities simply because the State issued a license for that activity, and failed to ensure that the risk of any take would be zero. The fact that State law prohibits a take will be inadequate to discharge this ESA duty, as it was in Massachusetts' case. Massachusetts' petition for certiorari should be granted because it raises important issues in the administration of the ESA that have profound federalism implications.

1. The majority, concurring, and dissenting opinions in *Sweet Home, supra,* 515 U.S. 687, all agreed that the "take" prohibition in the ESA is subject to a proximate cause limitation.[3] The United States also took the position before this Court in *Sweet Home* that "principles of proximate causation" should be applied to address the issue of "intervening acts" by others in the factual chain of causation for a take. (See Reply Br. for Petitioners at 4, n.4 in No. 94-859 (1995).) Because *Sweet Home* was a purely facial challenge, there was no need to rule on any particular pattern of take "causation" in a specific set of circumstances. However, four Justices thought that the pattern of indirect and attenuated causation in *Palila v. Hawaii Dept. of Land and Natural Resources ("Palila"),* 852 F.2d 1106 (9th Cir. 1988), did not satisfy proximate cause requirements, and that the *Palila* case had been wrongly decided. (See 515 U.S. at 709, 713-714 (O'Connor, J., concurring); *id.* at 715-716 (Scalia, J., dissenting).) Yet some courts continue to view the *Palila* decision, with its "but

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[3] See 515 U.S. at 697, n.9 ("take" prohibition and the harm regulation "incorporate ordinary requirements of proximate causation"); *id.* at 700 n.13; *id.* at 709 (harm regulation "is limited by ordinary principles of proximate causation") (O'Connor, J., concurring); *id.* at 712-713 (no Congressional intent "to dispense with ordinary principles of proximate causation", and "private parties should be held liable [for a take] only if their habitat-modifying actions proximately cause death or injury to protected animals") (O'Connor, J., concurring); *id.* at 732-733 (the "take" prohibition contains "a requirement of proximate causation") (Scalia, J., dissenting). The members of the Court differed as to whether the "harm" regulation, in fact, incorporated such a proximate cause restriction: the majority and concurring Justices thought that it did (and, therefore, the regulation was valid), and the dissenting Justices thought that it did not (and, therefore, the regulation was invalid).

for" causation analysis, as a model. Indeed, the Ninth Circuit apparently believes that this Court *endorsed* the *Palila* causation standard in *Sweet Home*. (See *Seattle Audubon Society v. Moseley*, 80 F.3d 1401, 1405 (9th Cir. 1996) (stating that in *Sweet Home* "five Justices affirmed *Palila* in all respects").)

Here, the First Circuit erroneously used a "but for" standard rather than the proximate cause standard required by *Sweet Home*. (See Pet. App. A-15 (take prohibitions "apply to acts by third parties that allow or authorize acts that exact a taking and that, *but for* the permitting process, could not take place."); Pet. App. B-57 ("*In the absence of permitting*, no fish entanglement could occur.") (emphases added).) By granting review the Court can address proximate cause principles applicable under the ESA, an issue discussed but left unresolved in *Sweet Home*.

2. Under the proximate cause standard, fishermen were "intervening independent actor[s]" (Pet. App. A-17), who displaced Massachusetts as the "cause" of any take, contrary to the First Circuit's conclusion. The First Circuit said that while a State's licensing of cars should not make the State liable for a car owner's illegal use of the car, here, it is impossible to use gillnets and lobster pots "in the manner permitted by [Massachusetts] without risk of violating the ESA by exacting a take." *Id.* But Massachusetts does not require fishermen to fish; nor does it prevent fishermen from taking additional precautions (beyond those mandated by the State) to avoid any take. Consequently, fishermen are an intervening, independent cause of any take. They alone make decisions about whether, when and how to fish in light of the risk of take and the prohibition against take under both federal and Massachusetts law. There is no showing that plaintiff could not have brought suit against fishermen (either via

a class action or otherwise), and thereby sought relief against those who directly cause any take.[4] Therefore, fishermen are an independent, intervening cause of any take under ordinary proximate cause principles.

3. Even under a "but for" causation standard, Massachusetts is not the "cause" of any whale take. Under "but for" causation:

> "The defendant's conduct [i.e., Massachusetts' licensing of fishing] is a cause of the event [i.e., take of whales] if the event would not have occurred but for the conduct; *conversely*, the defendant's conduct is *not a cause* of the event, *if the event would have occurred without it.*" (W. Keeton, et al., *Prosser and Keeton on the Law of Torts*, § 41, p. 266 (5th ed. 1984) (emphasis added).)

Thus, if a whale take would occur *regardless* of whether Massachusetts licenses fishermen and adopts protective fishing gear regulations, then, under hornbook law, Massachusetts' licensing is not a "but for" cause of any take. Federal law, of course, does not require Massachusetts to license and regulate fishing. If Massachusetts revoked all of its fishing gear regulation and chose not to license fishermen, that would not eliminate whale take; quite the contrary, it would undoubtedly *increase* whale take. Consequently, Massachusetts' licensing of fishermen and its regulation of fishing gear is not a "but for" cause of any take of whales by fishermen.

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[4] The status of fishermen as an independent, intervening cause would also seemingly raise the issue of whether the causation requirement for constitutional standing is satisfied or whether the alleged injury (take of whales) is traceable "to the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976).

This shows that the First Circuit was not imposing take liability because of Massachusetts' *affirmative* acts of licensing and regulating fishing gear (because without those things, more, not less take would have resulted). Instead, take liability is being imposed because Massachusetts did not regulate "enough" and ensure zero risk of take from third party activities. Causation in this case is based on alleged *omissions* or a failure to act, not on any *affirmative* acts of the State – which, of course, is why the remedy plaintiff seeks is *more* fishing regulation by Massachusetts, not less.

4. The First Circuit's causation theory is also inconsistent with the structure of the ESA. Section 7 of the ESA (16 U.S.C. § 1536) requires federal agencies that issue permits or licenses for private activities to avoid jeopardy to listed species (*id.*, § 1536(a)(2)); consult with federal wildlife agencies (*id.*, § 1536(a)(4)); and obtain biological opinions from the federal wildlife agency which may include incidental take authorization. (*Id.*, § 1536(b); see also 50 C.F.R. § 402.02 (definition of "action" to include federal permitting and licensing).) Significantly, these section 7 requirements apply only to *federal*, not State permitting programs. This is understandable given the greater species protection duties imposed upon the federal government in the ESA.[5]

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[5] For example, under the ESA, the federal government, but not a State, has the duty to adopt recovery plans under section 4(f) [16 U.S.C. § 1533(f)]; to conserve species under section 7(a)(1) [16 U.S.C. § 1536(a)(1)]; and to avoid jeopardy and the destruction of critical habitat under section 7(a)(2) [16 U.S.C. § 1536(a)(2)].

Similarly, the federal government, but not a State, has authority under the MMPA to adopt incidental take permits and authorizations, take reduction plans, emergency regulations, and a host of regulatory measures to protect whales. See MMPA,

The First Circuit has now created a de facto section 7 system for State permitting programs through its construction of the section 9 take prohibition. In operating its fishing permit program, Massachusetts now has to ensure, as a matter of federal law, that the activities of third party permittees will not create the risk of any take (which is akin to the section 7(a)(1) duty of federal permitting agencies to avoid jeopardy or the section 7(a)(1) duty of conservation). Massachusetts also is required to seek from federal wildlife agencies and obtain incidental take authorization to legalize Massachusetts' fishing permit program (which is arguably analogous to the section 7(a)(2) duty of federal permitting agencies to consult with federal wildlife agencies and obtain, pursuant to section 7(b)(4), incidental take authorization for jeopardy-causing activities). According to Massachusetts, NMFS itself shrank from the idea that the State, as a government regulator, must obtain incidental take authorization from NMFS to legalize the State's regulatory program under the ESA. (See Pet. 7, n.4 (noting that NMFS found Massachusetts' incidental take application "unnecessary and inappropriate").) This is understandable given that section 7 plainly applies only to federal, not State, permitting programs.

5. The First Circuit's "zero risk" standard against which the legality of Massachusetts' permitting program is to be measured is unprecedented in the administration of the ESA. Federal permitting is not subject to a "zero risk" standard under section 7 of the ESA. An insistence that remote actors ensure against any risk of a take would have socially undesirable and counterproductive results.

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section 118 [16 U.S.C. § 1387]; MMPA, section 101(a)(5)(E) [16 U.S.C. § 1371(a)(5)(E)].

For example, manufacturers of fishing gear could be liable for a take resulting from third party use of their nets simply because they allowed their product to enter the stream of commerce. If States are liable for a take based solely on their permitting function, some States might forego regulation entirely to avoid potential liability. The district court, in fact, noted that Massachusetts could do just that. (See Pet. App. B-42 ("If Defendants cease exercising control over the use of gillnets and lobster gear in Massachusetts waters, then they will not be held liable, under Section 9, for any subsequent harm caused by such nets.")) Thus, the expansive causation theory in this case creates an incentive for States *not* to regulate to protect whales. This, of course, leaves listed species worse off than before.

The First Circuit's decision gives States a stark choice: they must either reduce all risk to zero, or exit the field to avoid take liability; ameliorative steps that fail short of zero risk still will expose the State to ESA liability. (See Pet. App. A-22 (stating that "a single injury to one whale is a taking under the ESA" and that Massachusetts' "efforts to minimize such entanglements are *irrelevant*") (emphasis added).) The quest for zero risk and the imposition of liability upon distant and remote actors ends up being counterproductive of species protection. See generally S. Breyer, *Breaking the Vicious Circle: Towards Effective Risk Regulation* (Harvard 1993) (arguing that pursuit of zero risk may be counterproductive in generating other risks and misallocating resources). Because Congress did not intend such perverse species protection incentives, the Court should review and reverse the First Circuit's decision.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Dated: April 1998.

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT 7 1998
OFFICE OF THE CLERK

(5)

No. 97-1485

In the Supreme Court of the United States

OCTOBER TERM, 1998

PHILIP COATES, DIRECTOR, MASSACHUSETTS DIVISION OF MARINE FISHERIES, ET AL., PETITIONERS

v.

RICHARD MAX STRAHAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in upholding preliminary injunctive relief intended to bring petitioners into compliance with Section 9 of the Endangered Species Act (ESA), 16 U.S.C. 1538.

2. Whether Section 9 of the ESA, 16 U.S.C. 1538, violates the Tenth Amendment to the United States Constitution if the prohibition against taking of endangered species applies to state officials' licensing of the use of gillnet and lobster pot gear in state waters, which are listed as critical habitat for the endangered Northern Right whale, in a manner that takes Northern Right whales. Pet. App. B50-B63.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 97-1485

PHILIP COATES, DIRECTOR, MASSACHUSETTS DIVISION OF MARINE FISHERIES, ET AL., PETITIONERS

v.

RICHARD MAX STRAHAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Respondent brought this action against petitioners, who are officials of the Massachusetts Division of Marine Fisheries, challenging their licensing of the commercial use of certain types of fishing equipment, *i.e.* gillnet and lobster pot gear, in Massachusetts waters. Respondent alleged that such use causes the death of, and injury to, Northern Right whales, in violation of Section 9 of the Endangered Species Act (ESA), 16 U.S.C. 1538, and Section 102 of the Marine

Mammal Protection Act (MMPA), 16 U.S.C. 1372. Pet. App. B2-B5 & n.7, B18.

a. Section 9 of the ESA makes it unlawful for any "person" to "take" any species listed as endangered. 16 U.S.C. 1538(a)(1)(B) and (C). It also makes it "unlawful for any person * * * to attempt to commit, solicit another to commit, or cause to be committed, any offense" defined in Section 9. 16 U.S.C. 1538(g). "Person" is defined to include "any officer, employee, agent, department, or instrumentality" of a State, as well as "any State, municipality, or political subdivision of a State." 16 U.S.C. 1532(13). "Take" is defined to include killing, wounding, pursuing, or harming endangered species. 16 U.S.C. 1532(19); see *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703-704 (1995).

Congress conferred primary responsibility for administration of the ESA on the Secretary of the Interior and the Secretary of Commerce, with the latter being responsible for, *inter alia*, various marine species, including the Right whale (Eubalaena spp.). 16 U.S.C. 1532(15); 50 C.F.R. 222.23(a). The Secretary of Commerce has delegated many of his responsibilities under the ESA to the National Marine Fisheries Service (NMFS). 50 C.F.R. 402.01(b).

Under the ESA, the responsible Secretary may permit the taking of an endangered species if the taking is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. 1539(a)(1)(B). To obtain an incidental take permit, an applicant must submit a conservation plan to the Secretary. The Secretary may issue such a permit only if he makes certain findings regarding the impact of the take and the adequacy of the applicant's mitigation efforts. 16 U.S.C. 1539(a)(1) and (2).

b. The MMPA was enacted in 1972 in part to prevent the extinction or depletion of marine mammal stocks as a result of human activities. 16 U.S.C. 1361(1). Congress determined

that marine mammals "should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management," 16 U.S.C. 1361(6), recognizing that "there is inadequate knowledge of the ecology and population dynamics of such marine mammals," 16 U.S.C. 1361(3). The MMPA makes it unlawful, *inter alia*, for any person to take any marine mammal (whether or not it is listed under the ESA) in waters within the jurisdiction of the United States. 16 U.S.C. 1372(a)(2)(A); see 16 U.S.C. 1362(13) (MMPA definition of "take"), 1362(15). The Secretary may permit the taking of a marine mammal incidental to other activities in certain circumstances, 16 U.S.C. 1371(a)(5), although prior to 1994 that authority could not be exercised for takings incidental to commercial fishing. See p. 8, *infra*.

c. Right whales are listed as endangered under the ESA. 50 C.F.R. 17.11. They are, in fact, the most endangered of the large whales, with "only approximately 300 to 350 individual Right whales in the western North Atlantic, and the eastern North Atlantic population may be nearly extinct." Pet. App. B11. Northern Right whales are regularly present in Massachusetts waters during much of the spring, apparently for feeding purposes, with peak abundance occurring during April and with most leaving Cape Cod Bay by May 15. *Id.* at B12. In Cape Cod Bay, commercial use of gillnet and lobster pot gear is common and has entangled Northern Right whales and other whales. *Id.* at B21, B53-B54. Petitioners acknowledge that five Right whales have been found in Massachusetts waters entangled in fishing gear: "three in gill nets and two in lobster lines." *Id.* at B53 (citations omitted).

d. The ESA authorizes a person to bring a citizen suit "to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who

is alleged to be in violation" of the ESA or the regulations issued thereunder. 16 U.S.C. 1540(g)(1)(A). The MMPA does not contain a citizen-suit provision. Pet. App. B30.

2. On April 21, 1995, respondent filed the instant suit alleging various violations of the ESA and the MMPA. On September 24, 1996, the district court dismissed respondent's claims under the MMPA for lack of jurisdiction because of the absence of a citizen-suit provision in the MMPA. Pet. App. B30. At the same time, the court granted preliminary injunctive relief against petitioners under the ESA. *Id.* at B1-B75. The court found it likely that respondent would succeed on his claim that petitioners were in violation of Section 9 of the ESA by licensing the commercial use of gillnet and lobster pot gear in Massachusetts waters in a manner that takes Northern Right whales. *Id.* at B50-B63. Massachusetts law prohibits commercial fishing (including the placement of gillnet and lobster pot gear) in Massachusetts waters without a permit. See Mass. Gen. Laws ch. 130, § 80 (1997). Petitioners licensed such use, with limited restrictions only in certain areas. The court found that continued licensing by petitioners of the use of such gear in that manner would lead to further takings of Northern Right whales and that respondent had "presented sufficient evidence that the [petitioners] know or should know that fishing gear injure or kill endangered whales." Pet. App. B58-B59.

The court fashioned a preliminary injunction that was intended to address respondent's claims and to bring petitioners into compliance with the ESA, through their own initiatives, taking into account respondent's pro se status and the significant fishing interests at stake. Pet. App. A2, B8, B65-B67. The injunction required petitioners to (1) apply to NMFS for an incidental take permit under the ESA for Northern Right whales; (2) apply for a permit under the MMPA with respect to Northern Right whales; (3) prepare a proposal (to be submitted to the court) to restrict, modify, or

eliminate the use of fixed-fishing gear in Massachusetts waters listed as critical habitat for the Northern Right whale in order to minimize the likelihood that additional whales will be harmed; and (4) convene a working group to discuss with respondent and other interested persons "modifications of fixed-fishing gear and other measures to minimize harm to Northern Right whales." *Id.* at B74-B75.

3. The court of appeals vacated the portion of the district court's order requiring petitioners to apply for a permit under the MMPA because the MMPA contains no citizen-suit provision. Pet. App. A8-A9. The court of appeals otherwise affirmed the district court's order, applying a deferential standard of review applicable to preliminary injunctions. *Id.* at A3, A7-A8. The court of appeals reasoned that the ESA prohibits not only the direct taking of an endangered species, but also acts of a third party that indirectly harm the species, and that such acts could include those of "a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species." *Id.* at A16. Here, the court determined, "the state has licensed commercial fishing operations to use gillnets and lobster pots in specifically the manner that is likely to result in a violation of federal law," and the district court therefore properly entered a preliminary injunction to prevent the taking of Northern Right whales in violation of the ESA. *Id.* at A17-A22.

The court of appeals rejected petitioners' contention that the preliminary injunction violates the Tenth Amendment. Pet. App. A25-A34. The court recognized that, under *Printz* v. *United States*, 117 S. Ct. 2365 (1997), and *New York* v. *United States*, 505 U.S. 144 (1992), the federal government may not commandeer States into enacting or enforcing a federal regulatory program. Pet. App A25-A26. The court pointed out, however, that neither the ESA nor the district court's order requires Massachusetts to ban gillnet and

lobster-pot fishing, to regulate fisheries within its borders, or to assist in enforcing a federal regulatory program. *Id.* at A29, A31-A33. Rather, the court of appeals continued, the district court merely ordered petitioners to consider ways in which gillnet and lobster pot gear may be modified to avoid takings in coastal waters in violation of the ESA. *Id.* at A29. The court also noted that petitioners did not contend that Massachusetts' regulations governing commercial fishing could survive under the Supremacy Clause to the extent they may conflict with the ESA, *ibid.*, and that Congress had permissibly "offer[ed] States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation," *id.* at A33 (quoting *New York*, 505 U.S. at 167).

ARGUMENT

This case does not warrant plenary review. It concerns the propriety of a preliminary injunction entered by the district court to prevent further harm to an endangered species pending final resolution of the case on the merits. The aspects of the preliminary injunction affirmed by the court of appeals have no continuing significance in light of subsequent actions taken both by the National Marine Fisheries Service (NMFS) and by petitioners to protect the Northern Right whale, and there is no circuit conflict on the questions presented. The Court may, however, wish to grant the petition, vacate the judgment below, and remand the case for further consideration in light of the regulatory action taken by NMFS, which occurred after the district court ruled and was not fully considered by the court of appeals.

A. 1. The preliminary injunction entered by the district court and the state regulations that were in effect at the time are of no continuing significance in light of regulatory action that has since been taken by NMFS under the MMPA.

a. Federal actions to protect Northern Right whales in Cape Cod Bay date back well before the instant suit was filed in April 1995. In 1992, NMFS prepared a Recovery Plan for the Northern Right whale pursuant to Section 4(f)(1) of the ESA, 16 U.S.C. 1533(f)(1). Pet. App. B19. One objective of the ESA recovery plan is to "[r]educe or eliminate injury and mortality caused by fisheries and fishing gear." *Id.* at B21. On June 3, 1994, pursuant to Section 4(a)(3) of the ESA, 16 U.S.C. 1533(a)(3), NMFS designated critical habitat for the Northern Right whale, including Cape Cod Bay, thereby providing notice that the species "is dependent on these areas and features for its continued existence." Pet. App. B26-B27; 59 Fed. Reg. 28,793, 28,797-28,798 (1994); 50 C.F.R. 226.13(b).

Of most immediate relevance to the instant case are NMFS' actions regarding incidental take permits under the MMPA. In 1994, the MMPA was amended "to establish a new regime to govern the incidental taking of marine mammals during the course of commercial fishing operations." H.R. Rep. No. 439, 103d Cong., 2d Sess. 21 (1994). The amendments' long-term objective is to reduce incidental mortalities and serious injuries of marine mammals occurring in the course of commercial fishing operations to insignificant levels, approaching a zero rate of mortality and serious injury by the year 2001. 61 Fed. Reg. 64,501 (1996); Marine Mammal Protection Act Amendments of 1994, Pub. L. No. 103-238, § 11, 108 Stat. 546. The 1994 amendments added MMPA § 118, 16 U.S.C. 1387, which calls upon NMFS to develop and implement a take reduction plan (TRP) to assist in the recovery (and to prevent the depletion) of strategic stocks of mammals that interact with certain commercial fisheries, including those in Cape Cod Bay, according to certain 6-month and 5-year goals, taking into account the economics of the fisheries involved, existing technology, and state or regional fishery management plans.

The 1994 amendments also added MMPA § 101(a)(5)(E), 16 U.S.C. 1371(a)(5)(E), which provides a mechanism for NMFS, through the issuance of permits under the MMPA, to authorize incidental takes by commercial fishing operations of marine mammals listed as endangered or threatened under the ESA. Before the 1994 MMPA amendments, an incidental take statement could not be issued under the ESA for the taking of endangered or threatened marine mammals in the course of commercial fishing operations.[1] Under the 1994 amendments, an incidental take by commercial fishing operations may now be authorized if NMFS finds that the take will have a negligible impact on the marine mammal species or stock, that a recovery plan has been or is being developed under the ESA, and, where applicable, that a TRP has been or is being developed and a monitoring program has been established. 16 U.S.C. 1371(a)(5)(E).

As an initial step in implementing the 1994 MMPA amendments, NMFS issued interim incidental take permits on August 31, 1995, for those commercial fisheries that interact with certain endangered or threatened marine mammal species or stocks for which the required determinations could be made under Section 101(a)(5)(E)(i), including that the take would have only a negligible impact on the species or stock. 60 Fed. Reg. 45,399, 45,401 (1995). In addition, as required by ESA § 7, NMFS conducted an internal consultation with respect to its issuance of MMPA permits for those fisheries and concluded that the permits would not jeopardize the continued existence of endangered or threatened species under NMFS' jurisdiction. NMFS

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[1] ESA § 7(b)(4)(C), 16 U.S.C. 1536(b)(4)(C), provides that an incidental take statement may be issued under the ESA only if the take is also authorized under MMPA § 101(a)(5), 16 U.S.C. 1371(a)(5). Before 1994, the MMPA did not contain a provision that permitted such authorization in the course of commercial fishing operations.

therefore issued an incidental take statement for the authorized takes pursuant to ESA § 7(b)(4). 60 Fed. Reg. at 45,400; compare *Bennett* v. *Spear*, 520 U.S. 154, 169-170 (1997). NMFS could not, however, make the requisite finding under the MMPA that a take incidental to commercial fishing operations would have a negligible impact on several other marine mammals stocks, including the Western North Atlantic stock of the Northern Right whale, and it therefore did not issue an incidental take permit under the MMPA for those mammals. 60 Fed. Reg. at 45,400.

Following further extensive review, however—and after the district court had entered the preliminary injunction and this case had been briefed and argued in the court of appeals—NMFS promulgated the Atlantic Large Whale Take Reduction Plan (ALWTRP) and implementing regulations as an interim final rule, effective on November 15, 1997. 62 Fed. Reg. 39,157-39,188 (1997). Those regulations establish fishing restrictions to avoid the taking of Northern Right whales incidental to certain commercial fishing operations, including those in Cape Cod Bay. Among other things, the regulations prohibit lobstering in the Cape Cod Bay critical habitat, including both state and federal waters, between January 1 and May 15, unless it is conducted in compliance with specified requirements necessary to protect Northern Right whales from entanglement. 62 Fed. Reg. at 39,185-39,186. During other parts of the year, lobster pot gear must comply with at least two features from a list of possible modifications. *Ibid.* Fishing with anchored gillnet gear in the Cape Cod restricted area is prohibited from January 1 through May 15, unless NMFS specifies appropriate gear modifications or alternative fishing practices in the future. *Id.* at 39,186-39,187. During other parts of the year, anchored gillnet fishing in the area must comply with at least two features from a list of possible modifications. *Ibid.* NMFS conducted the necessary ESA § 7 consultation pro-

cess on the ALWTRP regulations, which yielded the conclusion that the regulations are not likely to jeopardize the continued existence of any species of large whales listed under the ESA. 62 Fed. Reg. at 39,183; see *id.* at 39,157-36,158.[2]

b. The regulations recently issued by NMFS fundamentally alter both the circumstances that led the district court to enter a preliminary injunction and the significance of the injunction itself. First, the regulations greatly undermine the factual predicate for the injunction. The district court's action was based on its finding of a likelihood that petitioners' continued licensing of the then-current manner of using certain gear in connection with commercial fishing in Cape Cod Bay would lead to further takings of Northern Right whales. Pet. App. B66-B67.[3] The restrictions

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[2] The ALWTRP seeks to eliminate serious injuries and mortalities not only by requiring gear modifications, but also by establishing a reporting system that encourages and trains commercial fishermen to report entanglements, provides for disentanglements by trained professionals, and includes an early warning system to fishermen of the presence of endangered whales in their immediate vicinity. See 62 Fed. Reg. at 39,159-39,162. Recently, an entanglement of a Northern Right whale was reported by a commercial fisherman off the coast of Cape Cod and professionals responded and managed to untangle the gear. See *Boston Globe*, Sept. 15, 1998, at B2, *available in* 1998 WL 9153277.

[3] That conclusion was, of course, based on Massachusetts law as it stood at the time and did not take into account the regulations subsequently promulgated by Massachusetts pursuant to state regulatory authority. See p. 15, *infra*. In fact, the ALWTRP regulations applicable to Cape Cod Bay essentially mirror those new Massachusetts regulations. 62 Fed. Reg. at 39,170. In response to a comment that it would be better to apply the federal regulations only to federal waters and to allow Massachusetts to implement its own then-pending plan for the critical habitat within its waters, NMFS noted that it was aware of difficulties in having both state and federal regulations in the same area. NMFS explained, however, that "[t]he Federal Government has the responsibility of implementing the MMPA," and that NMFS intends to work with

imposed by the ALWTRP regulations on the use of lobster pot and gillnet gear in Cape Cod Bay are intended to eliminate the likelihood of any such incidental takes.

Second, since the November 15, 1997, effective date of the ALWTRP regulations (which was after the date of the court of appeals' opinion), any Massachusetts regulations regarding the use of lobster pot and gillnet gear that are less restrictive than the ALWTRP regulations have no independent practical force, because persons fishing in the protected areas must comply with the more stringent federal standards in any event.

Third, Massachusetts apparently will no longer have less restrictive regulations. The MMPA contains a preemption provision, § 109(a), 16 U.S.C. 1379(a), which states:

> No State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species (which term for purposes of this section includes any population stock) of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species (hereinafter referred to in this section as "management authority") to the State under subsection (b)(1).[4]

The courts below did not consider what effect this preemption provision might have on the Massachusetts regulations that respondent originally challenged. Any preemption inquiry would in turn have to take account of the fact that NMFS and Massachusetts entered into a cooperative agreement under Section 6(c) of the ESA, 16 U.S.C. 1535(c) (on July 8, 1996, after the instant suit was filed but before entry

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Massachusetts "to ensure that both sets of regulations are consistent and responsive." *Id.* at 36,171.

[4] The Secretary has not transferred authority to Massachusetts for the conservation or management of Northern Right whales.

of the preliminary injunction), in which Massachusetts specifically agreed that "[a]ll activities affecting endangered and threatened marine mammals shall be consistent with" the MMPA and the ESA. Cooperative Agreement 1(g) at 4. Congress did not intend the preemption provision in Section 109(a) of the MMPA to affect such cooperative agreements with States. Pub. L. No. 97-58, § 4(b), 95 Stat. 986 (16 U.S.C. 1379 historical note). But quite aside from questions of preemption, Massachusetts has voluntarily *agreed* in the Cooperative Agreement that its activities affecting endangered species will be consistent with the MMPA, presumably including NMFS' Right whale regulations under the MMPA.

c. The courts below should be given the opportunity to consider in the first instance what preemptive or other legal impact NMFS' regulations and the cooperative agreement under the MMPA have on Massachusetts' regulatory efforts. That consideration may show that legal issues concerning ESA § 9 no longer have any meaningful bearing on this case. If so, the basis for petitioners' Tenth Amendment argument would also be eliminated.

The district court could, of course, consider the impact of the ALWTRP regulations in the future, in the context of either a motion by petitioners to vacate or modify the preliminary injunction or a request by respondent for a permanent injunction. The new MMPA regulations were not yet in effect, however, even at the time the court of appeals rendered its decision partially affirming the preliminary injunction, and the regulations were not fully considered by that court, which erroneously believed that they did not have any impact on this case. Pet. App. A15. In a case such as this, where intervening events were not fully considered below and may substantially affect the propriety of an outstanding injunction and the ultimate resolution of the case, it would be appropriate for this Court to vacate the judgment of the court of appeals and remand for further

consideration. See *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996). That disposition would be particularly appropriate here, because the intervening events involve federal regulatory developments, and the responsible federal agency did not participate in the litigation below.

2. Actions taken by petitioners themselves since the preliminary injunction was entered reinforce the conclusion that the injunction has little or no continuing practical importance and that a remand for further proceedings would be appropriate. Specifically, petitioners did not obtain a stay of the preliminary injunction, and they therefore have already complied with that injunction in a way that would be largely unaffected by any ruling by this Court on the merits of their ESA arguments.

a. On October 17, 1996, the Director of the Massachusetts Division of Marine Fisheries submitted to NMFS an application for authorization under the ESA to allow the taking of Northern Right whales incidental to commercial fishing activities in Cape Cod Bay from February through May of each year. 61 Fed. Reg. at 64,500. NMFS notified the public of its receipt of the application and requested public comments on its preliminary determinations, suggestions and issues related to the application. See *id.* at 64,500-64,504. On February 5, 1997, NMFS declined to process the application further, concluding that such an application by Massachusetts was unnecessary. NMFS reasoned that any authorization by NMFS to take endangered or threatened marine mammals must comply with both the ESA and the MMPA, and that any issuance of a permit under MMPA § 101(a)(5)(E), for the incidental taking of an endangered species in connection with commercial fishing operations would be a federal action that requires consultation with NMFS (in its capacity as administrator of the ESA) under Section 7 of the ESA, 16 U.S.C. 1536. An incidental take *statement* would have to be issued to NMFS pursuant to

Section 7(b)(4) of the ESA in conjunction with its issuance of an MMPA permit (see *Bennett* v. *Spear*, 520 U.S. at 169-170), thereby rendering the issuance of a separate incidental take *permit* to petitioners under Section 10 of the ESA unnecessary. 62 Fed. Reg. at 5386.

Petitioners also applied to NMFS for incidental take authorization under the MMPA for the same species and activity. 61 Fed. Reg. at 64,503.[5] NMFS declined to process the MMPA application as well because, on its own initiative under MMPA § 101(a)(5)(E), it already had considered authorizing the incidental taking of Right whales by commercial fisheries but was unable to make the requisite determination that any taking of Northern Right whales would have a negligible impact on the species. See 60 Fed. Reg. at 45,399; pp. 8-9, *supra*.

The portions of the preliminary injunction requiring petitioners to apply to NMFS for incidental take permits under the ESA and MMPA appear to have been designed principally to clarify for the district court the legal and regulatory position of NMFS under those two Acts. See Pet. App. B69-B70 n.45. Because of the way in which the MMPA and ESA interact (see pp. 8-9, *supra*), NMFS declined to act on the application under either statute, and the court-ordered applications therefore did not yield a definitive statement of what measures NMFS itself intended to undertake. The recent regulations issued by NMFS under the MMPA, by contrast, do serve to inform the district court of NMFS' regulatory approach.

b. Petitioners also complied with the other two requirements of the preliminary injunction: that they form a working group to discuss steps to minimize the take of Northern

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[5] The court of appeals subsequently vacated the portion of the preliminary injunction requiring petitioners to submit an application under the MMPA. Pet. App. A9-A10.

Right whales, and that they submit a report to the district court proposing ways to minimize such takes. Pet. 6-7; see C.A. Rec. App. 362-403. Moreover, petitioners explained to the district court that Massachusetts was "implement[ing] the measures contained in the proposed plan [that had been submitted to the court] pursuant to the Commonwealth's regulatory authority." C.A. Rec. App. 406; see *id.* at 411, 419-428 (notifying court that Massachusetts adopted emergency regulations regarding gear restrictions and disentanglement efforts for Northern Right whales and stating intentions regarding additional regulations). As we have pointed out above (see note 3, *supra*), the new Massachusetts regulations largely mirror the new NMFS regulations. Because the new Massachusetts regulations were promulgated pursuant to state regulatory authority and their adoption was not ordered by the district court, an order setting aside the preliminary injunction would not alter Massachusetts' current regulatory scheme regarding Northern Right whales in Cape Cod Bay.[6]

B. 1. Especially in light of the intervening developments discussed above, the interlocutory posture of this case, and

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[6] The district court ordered petitioners to convene an endangered whale working group to discuss with respondent and other interested persons "modifications of fixed-fishing gear and other measures to minimize harm to the Northern Right whales." Pet. App. B72. The district court specifically directed that it be modeled after the take reduction teams and the regional scientific review groups required under the MMPA. *Id.* at B72-B73. Whether or not that aspect of the preliminary injunction was warranted as an initial matter, it certainly is no longer necessary in light of Massachusetts' new regulations and NMFS' promulgation of the Atlantic Large Whale Take Reduction Plan, the interim final rule implementing that plan, and the ongoing responsibilities of the MMPA take reduction team under the plan. See 62 Fed. Reg. at 39,157, 39,159, 39,161. We also note that respondent apparently refused to participate in the court-ordered working group. See C.A. Rec. App. 294-296.

the unique circumstances of the case resulting from the predominant role of the MMPA in protecting the Northern Right whale, the ESA issues petitioners seek to present do not warrant plenary review by this Court.

The ESA makes it unlawful for a person not only to "take" an endangered species, but also to "cause" a take to be committed. 16 U.S.C. 1538(a)(1)(B) and (C), and (g). Petitioners urge application of a proximate cause standard for liability under the ESA, drawn from the common law and Justice O'Connor's concurring opinion in *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. at 712. See Pet. 25-28. But the court of appeals agreed with petitioners, even in the context of a preliminary injunction, that it should look to common law principles of causation to determine whether petitioners' manner of licensing certain fishing gear constitutes a take of Northern Right whales in violation of the ESA, and thus whether respondent was likely to succeed on the merits of his Section 9 claim. The court of appeals did not hold, as petitioners imply (Pet. 25-27), that a preliminary injunction was appropriate solely because the taking would not occur "but for" petitioners' authorization. Instead, the court of appeals reviewed the district court's detailed factual findings, Pet. App. A19-A22, and determined that the requisite degree of causality was present here under common law standards because "the state has licensed commercial fishing operations in specifically the manner that is likely to result in a violation of federal law," *id.* at A17.[7]

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[7] Petitioners are mistaken in characterizing the court of appeals' decision as outside the bounds of common law principles. Pet. 25-28. For example, some state courts have ruled that a state agency may be liable in tort for the issuance of a driver's license in violation of a statute mandating nonissuance or suspension of the license when a foreseeable injury results from the improperly licensed driver's operation of a motor vehicle. See, *e.g.*, *Oleszczuk* v. *State*, 604 P. 2d 637 (Ariz. 1979); *Pendergrass* v. *State*, 702 P. 2d 444 (Ct. App.), *review denied*, 707 P. 2d 584 (Or. 1985);

Such a claim limited to application of a legal standard to a particular set of facts does not warrant review by this Court. Sup. Ct. R. 10.

Moreover, the decision of the court of appeals on this point is consistent with the decisions of several other courts of appeals that have upheld injunctions against governmental regulatory action that was found to cause the death or injury of a listed species by expressly authorizing specific conduct that is reasonably likely to kill or injure members of the species, especially where the agencies are managing or protecting public resources. See, *e.g.*, *Sierra Club* v. *Yeutter*, 926 F.2d 429 (5th Cir. 1991) (U.S. Forest Service's manner of permitting clear-cutting in certain areas of federal timberland impaired endangered species' essential behavioral patterns resulting in take in violation of ESA § 9, which district court was authorized to enjoin pending formulation of a proper timber management plan); *Loggerhead Turtle* v. *County Council of Volusia County*, 148 F.3d 1231, 1249-1253 (11th Cir. 1998) (harm to endangered turtles caused by artificial beachfront lighting was fairly traceable for standing purposes to county's inadequate regulations governing beachfront lighting), pet. for reh'g No. 97-2083 (filed Aug. 21, 1998); cf. *Ramsey* v. *Kantor*, 96 F.3d 434, 442 (9th Cir. 1996) (holding that Oregon and Washington could lawfully promulgate fishing regulations that would result in incidental takes of threatened and endangered species without first obtaining an incidental take permit under ESA § 10 only if "the actions in question are contemplated by an incidental take statement issued under [ESA §7] and are

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Trewin v. *State*, 198 Cal. Rptr. 263 (Ct. App. 1984). In those circumstances, as in this case, the agency has authorized the specific conduct that presents a significant risk of harm, the operation of a motor vehicle by a person with a physical or mental condition that makes a future accident particularly likely.

conducted in compliance with the requirements of that statement").[8]

Those cases, like the present one, turned on specific facts. As this Court explained in *Sweet Home*, "[i]n the elaboration and enforcement of the ESA, the Secretary and all persons who must comply with the law will confront difficult questions of proximity and degree * * * *. These questions must be addressed in the usual course of the law, through case-by-case resolution and adjudication." 515 U.S. at 708. The court of appeals below, in a subsequent case, specifically recognized that different facts result in different causation determinations under ESA § 9. *Strahan* v. *Linnon*, No. 97-1787, 1998 U.S. App. LEXIS 16314 at *13 (1st Cir. July 16, 1998). There, the court held that the Coast Guard was not responsible under Section 9 of the ESA for takings by non-Coast Guard vessels to which it issued certificates of documentation, which are analogous to automobile and driver licenses. The court cited the court of appeals opinion in the instant case (see Pet. App. A17), which contrasted such general licensing that allows use of a vehicle in a manner that does not risk violation of law with the State's licensure of the commercial use of gillnet and lobster pot gear in "specifically the manner that is likely to result in a violation of federal law."

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[8] See also *Defenders of Wildlife* v. *EPA*, 882 F.2d 1294, 1298, 1301 (8th Cir. 1989) (injunction against EPA's continued registration of certain pesticides that allowed others to distribute and use them in a manner that resulted in death of endangered species); *United States* v. *Town of Plymouth*, 6 F. Supp. 2d 81, 90-91 (D. Mass. 1998) (preliminarily enjoining town's continued permitting of off-road vehicles at certain times on certain areas of beach owned in part by town and in part by private individuals without appropriate precautions based on finding that use of vehicles causes prohibited ESA § 9 take of endangered bird species that nests on beach).

2. Review of petitioners' Tenth Amendment claim likewise is not warranted, especially in view of the "fundamental and longstanding principle of judicial restraint requir[ing] that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988). Here, any necessity of deciding the constitutional challenge to the preliminary injunction could well be eliminated as the result of further consideration by the courts below of NMFS' regulations under the MMPA.

Moreover, there is no circuit conflict on the application of the Tenth Amendment in this setting, and that issue does not otherwise warrant review. The Tenth Amendment and constitutional principles of federalism prohibit the federal government from ordering States to enact or enforce a federal regulatory program or conscripting state officers to enforce such a program. *Printz* v. *United States*, 117 S. Ct. 2365, 2384 (1997); *New York* v. *United States*, 505 U.S. 144 (1992). Contrary to petitioners' assertions, the court of appeals did not interpret Section 9 of the ESA to create "[a] federal obligation requiring a State to regulate to eliminate all risk of private ESA violations." Pet. 17. As petitioners themselves note (*ibid.*), the ESA creates no obligation for States to regulate commercial fishing, and the courts below agreed. Pet. App. A33, B41. The gravamen of the Commonwealth's violation of the ESA as found by the district court was not insufficient regulation, but the affirmative licensing by the State of commercial fishing operations to use gillnet and lobster pot gear specifically in a manner that was likely to cause a take of a Northern Right whale.

This Court has noted the difference between congressional commands that a State implement a federal program and judicial orders to state officials requiring them to comply with federal law. *New York*, 505 U.S. at 179. Congress does not violate the Tenth Amendment by requiring States to

comply with generally applicable requirements of federal law. *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *EEOC* v. *Wyoming*, 460 U.S. 226 (1983). Section 9 of the ESA, as interpreted by the court of appeals, is not a command to States to regulate, but rather a generally applicable prohibition on activities by States and others that cause harm to endangered species.

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of the regulations of the National Marine Fisheries Service that became effective on November 15, 1997. In the alternative, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1998

No. 97 - 1485

Supreme Court of the United States

October Term 1997

Philp Coates, Director of the Massachusetts Division of Marine Fisheries, Et Al..

Petitioners,

v.

Richard Max Strahan

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIEST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Richard Max Strahan
% Sierra Club of Massachusetts
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PRO SE AND PROUD

RESTATEMENT OF ISSUES PRESENTED

1. Does a Federal court possess jurisdiction under the Endangered Species Act. 16 U, S. C. §§ 1631 et seq., to issue injunctive relief to enjoin individuals acting as state and municipal officials from issuing licenses in the course of their official duties that authorizes activities that directly result in the incidental taking of listed species of wildlife in violation of Sections 9(a)(1)(B) and 9(g) of the Act. 16 U. S. C.. §§ 1538(a)(1)(B) and 1538(g).

2. Does the Tenth Amendment of the Constitution of the United States immunize individuals, when acting in their official capacity as state officials, when a Federal court has determined that they are in violation of the ESA's Section 9(a)(1)(B) and Section 9(g) prohibitions against the taking of listed species of wildlife, intentionally or incidentally, from being coerced by a Federal court into implementing regulations that will amend the violating activity so that it will be in compliance with the federal regulatory scheme for the conservation of listed species of endangered wildlife.

STATEMENT OF THE CASE

Respondents commenced the action in the District Court because the Petitioners refused despite numerous requests of the Respondent to cease licensing and regulating the deployment of fishing gear in United States coastal waters, that are under the concurrent state jurisdiction of Massachusetts, despite knowing that listed endangered species of whales were repeatedly becoming entangled in this fishing gear, and as a consequence were being seriously injured and killed as a result. The Respondent commenced his civil action to enjoin the Petitioners from further licensing the deployment of said fishing gear until they were willing to do so in a manner that was safe for listed species of whales and would not result in these endangered whales becoming entangled in their licensed fishing gear.

The Respondents are perpetrators of environmental crimes and are knowing, and willing, violators of the Section 9(a)(1)(B) take prohibitions of the ESA. Until this action was commenced in the lower court, they had consistently refused all requests by the Respondent and others to conduct their regulation and licensing of marine fisheries activities in a manner that prevented listed species of whales from becoming entangled in the fishing gear whose deployment in United States coastal waters that they licensed and regulated other individuals to do.

Contrary to statements made *post hoc* in their petition for certiorari to the Court, they never once adopted any regulation to require that the marine fisheries activities that they license were conducted in a manner that protected listed species of whales from becoming entangled in the fishing gear that they licensed individuals to deploy in United States coastal waters. They formally refused very request to do so when they were formally petitioned by the Respondent to do so.

Just as they are in standing violation of the Section 9(a)(1)(B) take prohibitions of the ESA for causing the entanglement of listed species of whales as a result of their licensing and regulating of marine fisheries activities, they are also in violation of the take prohibitions of Massachusetts wildlife laws. The Massachusetts Endangered Species Act

("MESA") was passed by the state legislature in 1990 and was directly modeled on the Federal ESA. MESA also prohibits the incidental taking of listed species. MESA required that all species listed by the Federal government as endangered pursuant to the ESA were also to be included on the State list of endangered species established under MESA. The Northern Right Whale, Humpback Whale, and all other species that the Respondent sought to protect in his action are listed by Massachusetts, pursuant to MESA, as listed endangered species native to Massachusetts.

The Appeal Court erred in affirming the District Court's refusal to enjoin the Respondents' unlawful taking of listed species of whales. The District Court impressively chose to do little but simply coerce the Respondents into adopting regulations to amend their marine fisheries activities on a simple claim that it would to some degree mitigate their adverse impact on listed species of whales.

In so doing the District Court ordered through implicit coercion that the Petitioners were to either regulate their marine fisheries activities in support of the federal regulatory scheme for the protection and conservation of endangered species. It was improper for the District Court to do this, and for the Appeal Court to affirm the lower court's decision, for such coercion is in violation of the Tenth Amendment of the Constitution.

However, the Petitioners voluntarily did so, and never once refused to do so. They could have simply presented the required conservation plan and nothing else. The District Court required in no way that they do more. Whatever regulations that they adopted they did so voluntarily and have no basis to appeal such voluntary actions on their part, and whatever they have they have certainly have waived.

The Court should deny their petition.

1. *Does a Federal court possess jurisdiction under the Endangered Species Act, 16 U, S. C. §§ 1631 et seq., to issue injunctive relief to enjoin individuals acting as state and municipal officials from issuing licenses in the course of their official duties that authorizes activities that directly result in the incidental taking of listed species of wildlife in violation of Sections 9(a)(1)(B) and 9(g) of the Act. 16 U. S. C.. §§ 1538(a)(1)(B) and 1538(g).*

It does.

2. *Does the Tenth Amendment of the Constitution of the United States immunize individuals, when acting in their official capacity as state officials, when a Federal court has determined that they are in violation of the ESA's Section 9(a)(1)(B) and Section 9(g) prohibitions against the taking of listed species of wildlife, intentionally or incidentally, from being coerced by a Federal court into implementing regulations that will amend the violating activity so that it will be in compliance with the federal regulatory scheme for the conservation of listed species of endangered wildlife.*

It does.

CONCLUSION

For the above stated reasons, the Court should deny the Petitioners petition for writ of certiorari.

Respectfully Submitted,

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Pro Se

Date: April 9, 1998

MOTION FILED
APR 6 1998

No. 97-1485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PHILIP COATES, DIRECTOR OF
THE MASSACHUSETTS DIVISION OF
MARINE FISHERIES, ET AL.,

Petitioners,

v.

RICHARD MAX STRAHAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF CONSERVATION LAW FOUNDATION, INC. IN OPPOSITION

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MOTION OF CONSERVATION LAW FOUNDATION, INC. FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Conservation Law Foundation, Inc. ("CLF") respectfully moves for leave to file the attached Brief Amicus Curiae of Conservation Law Foundation, Inc. in Opposition. CLF requested and obtained from counsel of record for the petitioners his consent to filing of this brief. CLF requested the con-

sent of Richard Max Strahan, the plaintiff who appeared *pro se* in this case below and the respondent before this Court, but he withheld it. In support of this motion, CLF states:

1. This case involves an attempt to force officials of the Commonwealth of Massachusetts to bring the state's regulation of fixed fishing gear into compliance with the Endangered Species Act, 16 U.S.C.A. §§ 1536 *et seq.* (West 1985 & Supp. 1996) ("ESA") by protecting right whales and other endangered great whales from death and injuries due to entanglement in lobster pot lines and gillnets.

2. CLF is a regional environmental law organization with more than 12,000 members. Approximately 10,000 of those members reside in Massachusetts. CLF has offices in Massachusetts and three other New England states.

3. CLF was granted leave to file a brief *amicus curiae* and to participate in oral argument before the Court of Appeals for the First Circuit in this case. *See Strahan v. Coxe,* 127 F.3d 155, 157 (1st Cir. 1997) (*Strahan II*). CLF also filed memoranda and briefs and participated in hearings, oral argument and status conferences in the District Court. *See Strahan v. Coxe,* 939 F. Supp. 963, 966 (D. Mass. 1996) (*Strahan I*), Appendix to Petition for a Writ of Certiorari ("App.") at B-7 (referring to the first brief filed by CLF in the District Court).

4. Although petitioners state correctly that CLF "appeared and argued . . . in both the District and Circuit Courts," Petition for a Writ of Certiorari ("Petition"), Parties to the Proceeding, their characterization of CLF's position as supporting the plaintiff is inaccurate. While CLF agreed that

the petitioners' regulation of fixed fishing gear violated the ESA, it argued for a considerably more limited and carefully crafted remedy than the outright ban on lobster pots and gillnets sought by the plaintiff. *See Strahan I,* 939 F. Supp. at 967, 989, App. at B-8, B-67. More importantly for the purpose of this Petition, CLF was the only party to argue for affirmance of the District Court's order by the Court of Appeals. *See Strahan II,* 127 F.3d at 158, App. at A-3 ("Defendants appeal the district court's preliminary injunction order. Plaintiff Strahan cross-appeals the district court's . . . refusal to grant him the precise injunctive relief sought . . ."). Without CLF's participation, this Court is unlikely to receive any argument supporting denial of the Petition.

5. CLF has been involved for many years in other litigation and administrative proceedings relating to the protection of endangered species. CLF has been a petitioner or plaintiff in numerous cases involving claims under the ESA, including *Roosevelt Campobello International Park Commission v. EPA,* 684 F.2d 1041 (1st Cir. 1982); *Conservation Law Foundation v. Andrus,* 623 F.2d 712 (1st Cir. 1979); *Conservation Law Foundation v. Clark,* 594 F. Supp. 1373 (D. Mass. 1984); *Conservation Law Foundation v. Watt,* 560 F. Supp. 561 (D. Mass. 1983). Each of these cases involved activities that were likely to cause serious harm to endangered or threatened marine mammals. CLF has also filed comments in administrative dockets under the ESA.

6. CLF respectfully submits that its brief may aid this Court in deciding whether or not to grant the Petition.

7. For the foregoing reasons, CLF requests that this Court grant its motion to file the following Brief Amicus Curiae of Conservation Law Foundation, Inc. in Opposition.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Did Massachusetts officials who licensed placement of lobster and gillnet fishing gear in the right whale's critical habitat "take" right and other endangered whales that were injured or killed as a result of entanglement in fishing gear, in violation of § 9(a)(1)(B) of the Endangered Species Act?

2. Did a preliminary injunction requiring Massachusetts officials to develop a proposal to restrict, modify or eliminate the use of fixed fishing gear in right whale critical habitat, in order to minimize the likelihood that additional whales would actually be harmed by such gear, violate the Tenth Amendment to the U.S. Constitution?

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Amicus curiae Conservation Law Foundation, Inc. ("CLF")[1] respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the First Circuit in this case. The decision is reported as *Strahan v. Coxe* at 127 F.3d 155 (1st Cir. 1997).

STATEMENT OF THE CASE

Right whales are slow. They depend on coastal waters. They float when dead. These three unfortunate characteristics, combined with high commercial value as a source of baleen and blubber, gave these whales their common name: for centuries, they were the "right" whale to hunt. *Final Recovery Plan for the Northern Right Whale (Eubalaena glacialis),* National Marine Fisheries Service (December 1991) ("*Final Recovery Plan*") at 1. By 1935, the species was so depleted that most whaling nations agreed to ban its pursuit. *Id.* More than sixty years later, the right whale is still the most endangered large whale on earth. *Strahan v. Coxe,* 939 F. Supp. 963, 968 (D. Mass. 1996) ("*Strahan I*"), Appendix to Petition for a Writ of Certiorari ("App.") at B-10. With between 300 and 350 individuals left in the North Atlantic, and only 600 remaining in all the world's oceans, the likelihood of its recovery is uncertain at best. *Final Recovery Plan* at 1.

Plaintiff Strahan brought this action seeking a declaration that the petitioners' permitting of fixed fishing gear, includ-

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[1] Alan Wilson and Stephen L. Saltonstall co-authored this brief in its entirety. No person or entity other than CLF, its members, and its counsel made any monetary contribution to the preparation or submission of the brief. *See* Sup. Ct. R. 37.6.

ing gillnets and lobster pots, took right and other endangered whales in violation of § 9(a)(1)(B) of the Endangered Species Act, 16 U.S.C.A. § 1538(a)(1)(B) (West 1985 & Supp. 1996) ("ESA"). *See Strahan I,* 939 F. Supp. at 965-66 & n.7, App. at B-4 & n.7. He also sought an order enjoining the petitioners from issuing any new fishing permits and revoking existing ones. *Id.* at 967, App. at B-7 to B-8. While supporting the claims of violations of the ESA, CLF has advocated a considerably more limited remedy. *See id.* at 989, App. at B-67.

Although people no longer hunt right whales, certain human activities continue to threaten the species' survival and impede its recovery. Entanglement in fishing gear and degradation of habitat are principal causes of injury to right whales and to other marine mammals, such as the humpback whale. *Id.* The District Court found that "the entanglement of endangered whale species in fishing gear in Massachusetts waters causes injury or death to these species," *id.* at 984, App. at B-52 to B-53, and that entanglements had occurred with "fishing gear permitted by the Defendants in Massachusetts waters," *id.* at 985, App. at B-56.

The petitioners challenged these findings below, but the Court of Appeals upheld them. *Strahan v. Coxe,* 127 F.3d 155, 164-65 (1st Cir. 1997) ("*Strahan II*"), App. at A-19 to A-21. As the Court of Appeals observed, "the [district] court cited eleven occasions on which Northern Right whales had been found entangled in Massachusetts waters between 1978 and 1995." *Id.* at 165, App. at A-20. The Court of Appeals also sustained as reasonable "[t]he district court's inference that gear fixed in Massachusetts waters was licensed by the Commonwealth, and was not set illegally or brought into Massachusetts waters from another area by the whale. . . ." *Id.* at 165, App. at A-21. This inference was based on evi-

dence that, in at least three instances, entangled whales had been unable to escape or break free from the gear but remained anchored in Massachusetts waters. *See id.; Strahan I,* 939 F. Supp. at 984-85, App. at B-55 to B-56 ("The Defendants [did] not dispute any of this evidence.").

The Commonwealth's regulation of fisheries within Massachusetts waters is comprehensive. As the Court of Appeals observed:

> The Massachusetts Division of Marine Fisheries ("DMF") is vested with broad authority to regulate fishing in Massachusetts's coastal waters, which extend three nautical miles from the shoreline. Nearly all commercial fishing vessels must receive a permit from DMF in order to take fish, including shellfish, from Massachusetts coastal waters.

Strahan II, 127 F.3d at 159, App. at A-6 (citations omitted). Pursuant to this authority, the petitioners had previously imposed numerous limitations on gillnet and lobster pot fishing, including prohibition of their use in certain areas and at certain times of year, requirements for gear marking and maximum line length, limitations on the number of lobster traps, and removal of all sink gillnets from certain areas in specified months to respond to "the alarming depletion of the Harbor porpoise. . . ." *Id.; see Strahan I,* 939 F. Supp. at 974-75, App. at B-27 to B-29. The Commonwealth had also restricted the use of gillnets south and west of Cape Cod and within parts of Massachusetts Bay because of the importance of these areas to the right whale. *Strahan I,* 939 F. Supp. at 987-88, App. at B-63.

The waters regulated by the Commonwealth under its fisheries jurisdiction[2] include most of Cape Cod Bay, *see id.* at 991 n.46, App. at B-70 to B-72 n.46, which has unique importance to the survival and recovery of the right whale. The National Marine Fisheries Service ("NMFS") has designated Cape Cod Bay as critical habitat[3] for right whales under the ESA, 16 U.S.C.A. § 1533(a)(3)(1). *See* 59 Fed. Reg. 28,793 (1994) (codified at 50 C.F.R. § 226.13); *see also* 59 Fed. Reg. at 28,807 (map showing the area of Cape Cod Bay designated as critical habitat). Research published in 1990 "reported 2,643 sightings of 113 individual right whales in Massachusetts waters, with a concentration in the eastern part of [Cape Cod Bay]." 59 Fed. Reg. at 28,795. These individuals represented one-third of the total estimated North Atlantic population. Although primarily important as foraging habitat, the Bay also serves as a nursery and, occasionally, a calving area. *See id.* (Other researchers reported 21 sightings of small calves in 12 of the 26 years included in their study of the Bay.) The District Court found that the majority of right whales are present in Massachusetts waters

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[2] Massachusetts coastal waters are "all waters of the commonwealth within the rise and fall of the tide and the marine limits of the jurisdiction of the commonwealth," Mass. Gen. Laws Ann. c. 130, § 1 (West 1991 & Supp. 1997), and within "three geographical miles from the shoreline," Mass. Regs. Code tit. 322, § 8.02.

[3] "Critical habitat" is defined, in relevant part, as "the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection. . . ." 16 U.S.C.A. § 1532(5)(A)(i).

during spring feeding, from approximately January 1 to May 15 each year. *Strahan I,* 939 F. Supp. at 968, App. at B-11.

Holding that the petitioners' fishing regulations violated the ESA's taking prohibition due to whale entanglement, the District Court entered a preliminary injunction requiring, in relevant part, that they (1) prepare a proposal to restrict, modify or eliminate the use of fixed fishing gear in the right whale critical habitat "to minimize the likelihood additional whales will actually be harmed by such gear;" and (2) convene an Endangered Whale Working Group to engage in substantive discussions with interested parties regarding modifications of fixed fishing gear and other measures to minimize harm to right whales. *Strahan I,* 939 F. Supp. at 990-91, App. at B-70 to B-73. These elements of the order were based on the District Court's finding that scientific evidence suggested implementation of a number of gear modifications could minimize the risk of entanglement. *See id.* at 990 n.46, App. at B-70 n.46. The Court of Appeals affirmed this exercise of equitable discretion. *Strahan II,* 127 F.3d at 166-71, App. at A-22 to A-36. It rejected the petitioners' "claim that, although the district court could have ordered an injunction barring all Commonwealth licensing activity, it could not require the Commonwealth to implement measures designed to accord Northern Right whales greater regulatory protection." *Id.* at 166, App. at A-22.

Following entry of the District Court's order, the petitioners convened the Endangered Whale Working Group and, on December 16, 1996, submitted a proposal to impose restrictions on gillnet and lobster pot fishing designed to reduce the likelihood of right whale entanglement. Record Appendix filed by the petitioners in the Court of Appeals ("R.A.") at 362-69. As the petitioners state, "the District Court did not enter further orders, but retained oversight authority over the

Commonwealth's regulatory efforts and measures." Petition for a Writ of Certiorari ("Petition") at 7. In fact, the petitioners expressly represented to the District Court that they intended to implement the proposal without further order pursuant to the Commonwealth's regulatory authority. *See* R.A. at 406; *see also* Mass. Regs. Code tit. 322, § 12 (regulations adopted pursuant to Mass. Gen. Laws Ann. c. 130, § 17(10) (West 1991 & Supp. 1997) whose "purpose . . . is to minimize the risk of right whale entanglement in Cape Cod Bay, especially in the Critical Habitat, during the period of right whale high use, January 1 through May 15. . . .")

On July 22, 1997, after the appeal in this case had been briefed and argued but before the Court of Appeals rendered its decision, NMFS promulgated a final interim rule under the Marine Mammal Protection Act, 16 U.S.C.A. §§ 1361 *et seq.* (West 1985 & Supp. 1996). *See* 62 Fed. Reg. 39,157 (1997) (to be codified at 50 C.F.R. Part 229); *Strahan II,* 127 F.3d at 159, App. at A-5. The regulation prohibits lobster fishing in the Cape Cod Bay critical habitat from January 1 through May 15, unless the gear complies with specific requirements set forth in the rule, 62 Fed. Reg. at 39,185-86, and bans gillnet fishing entirely in the critical habitat during that period, unless in the future the agency approves gear modifications or alternative fishing practices that reduce the risk of entanglement, 62 Fed. Reg. at 39,186-87. The rule also includes specifications for lobster and gillnet fishing gear applicable throughout the year. *See* 62 Fed. Reg. at 39,185-86. The regulation applies in both state and federal waters along the east coast of the United States, except for areas specifically exempted. *See* 62 Fed. Reg. at 39,184-85. With respect to the portions of the Cape Cod Bay critical habitat in Massachusetts waters, "[t]he requirements in this interim final rule mirror the current regulations of the Com-

monwealth." 62 Fed. Reg. at 39,170. The "current regulations" of the Commonwealth are those adopted in response to the District Court's order. *See* Mass. Regs. Code tit. 322, § 12.

ARGUMENT

This Court will grant a petition for a writ of certiorari "only for compelling reasons." Sup. Ct. R. 10. Neither of the usual grounds supporting issuance of the writ is present in this case. There is no conflict among decisions of courts of appeals on the relevant issues; indeed, three other courts of appeals have interpreted the pertinent provisions of the ESA consistently with the First Circuit's opinion in this case. Nor does that opinion conflict with a decision of this Court. The Petition should therefore be denied.

Petitioners advance two lines of attack on the decision made by the Court of Appeals. First, they assert that, in affirming the District Court's preliminary injunction, the Court construed the ESA in a way that conflicts with the Tenth Amendment to the U.S. Constitution and this Court's decisions in *New York v. United States,* 505 U.S. 144 (1992) ("*New York*") and *Printz v. United States,* ___ U.S. ___, 117 S. Ct. 2365 (1997) ("*Printz*"). *See* Petition at 16-24. Second, they argue that the Court of Appeals' interpretation of the ESA's prohibition against "taking" endangered species, 16 U.S.C.A. § 1538(a)(1)(B), is inconsistent with *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,* ___ U.S. ___, 155 S. Ct. 2407 (1995) ("*Sweet Home*"). *See* Petition at 25-28. The decision of the Court of Appeals correctly distinguished, however, between the District Court's imposition of equitable relief to halt a violation of Federal law and the Congressional commands to states and their offi-

cials that this Court held unconstitutional in *New York* and *Printz*. The Court of Appeals' interpretation of the ESA was also correct, and consistent both with this Court's analysis in *Sweet Home* and with the decisions of other Federal courts in similar cases. The petitioners have therefore failed completely to demonstrate the compelling reasons required to invoke this Court's discretionary review on a writ of certiorari. *See* Sup. Ct. R. 10.[4] Because the conclusion that the petitioners' regulation of fixed fishing gear violated the ESA is a logical predicate to analysis of whether the District Court's order represented a proper exercise of judicial authority, CLF will address the taking issue first.

I. THE COURT OF APPEALS' INTERPRETATION OF THE ESA'S TAKING PROVISION WAS CONSISTENT WITH *SWEET HOME* AND WITH THE DECISIONS OF OTHER FEDERAL COURTS.

A. *The Court of Appeals' Decision was Consistent with Sweet Home.*

Section 9(a)(1)(B) of the ESA makes it unlawful for any person subject to the jurisdiction of the United States to

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[4] Where, as here, the review sought is of an interlocutory order, the threshold to demonstrate compelling reasons is especially high. "Ordinarily, . . . 'this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the case.'" R. Stern & E. Gressman, *Supreme Court Practice*, 196 (1993) (quoting *American Construction Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1893)). Although the petitioners note this consideration in passing, *see* Petition at 16, they offer no reason why it should not apply in this case.

"take" any endangered species. 16 U.S.C.A. § 1538(a)(1)(B). "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct." 16 U.S.C.A. § 1532(19). The prohibition against taking applies to any "person," defined broadly and including "any officer, employee, agent, department, or instrumentality . . . of any State or political subdivision thereof." 16 U.S.C.A. § 1532(13).

Sweet Home involved a facial challenge to the definition of "harm"[5] contained in the Department of the Interior's regulations implementing the ESA. 115 S. Ct. at 2410. This Court held that "the statutory term 'harm' encompasses indirect as well as direct injuries . . . ." *Id.* at 2413. This conclusion was based on the ESA's language, *id.* at 2412-13, its broad statutory purpose, *id.* at 2413-14, and on the addition by Congress in 1982 of authority for the Secretary of the Interior to issue permits for activity that would otherwise be prohibited "'if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity,'" *id.* at 2414 (quoting 16 U.S.C.A. § 1539(a)(1)(B)). This amendment "strongly suggests that Congress understood § 9(a)(1)(B) to prohibit indirect as well as deliberate takings." *Id.* In interpreting the ESA's taking provision to include indirect as well as direct injuries, this Court held the statute and the regulation's definition of harm to incorporate "ordinary requirements of proximate causation and foreseeability." *Id.* at 2414 n.13 ("The Secretary [of the Interior] did not need to include 'actually' [in the regulation] to connote 'but for' cau-

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[5] "*Harm* in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3 (1995).

sation, which the other words in the definition obviously require.").

In the instant case, the Court of Appeals simply applied those ordinary requirements in addressing the petitioners' argument "that the district court improperly found that [their] regulatory scheme 'indirectly causes' these takings." *Strahan II,* 127 F.3d at 163, App. at A-16. The Court of Appeals rejected the petitioners' contention "that an interpretation of 'cause' that includes the 'indirect causation' of a taking by the Commonwealth through its licensing scheme falls without the normal boundaries." *Id.,* App. at A-16 to A-17. In so doing, it upheld the application of the *Sweet Home* analysis contained in the opinion of the District Court. *See id.* at 163, App. at A-16 ("We believe that . . . the district court properly found that a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA.")

The District Court concluded that petitioners' licensing of fixed fishing gear violated the ESA's taking prohibition in two respects. First, the District Court determined that permitting of fixed fishing gear by the petitioners was a taking in violation of § 9(a)(1)(B), 16 U.S.C.A. § 1538(a)(1)(B). *Strahan I,* 939 F. Supp. at 983-86, App. at B-50 to B-59. Second, it held that "permitting of fixed fishing gear by the Defendants results in a harmful taking of endangered whales through the modification of their habitat." *Id.* at 987, App. at B-62. The District Court expressly followed *Sweet Home's* discussion of indirect injury and proximate causation in reaching the first conclusion. *See Strahan I,* 939 F. Supp. at 985-86 & n.39, App. at B-56 to B-58 & n.39. It rested its second conclusion squarely on *Sweet Home's* holding that sustained the regulatory definition of "harm" to include

habitat modification which actually kills or injures wildlife. *See Strahan I,* 939 F. Supp. at 986-88, App. at B-59 to B-63.

Petitioners rely in particular on Justice O'Connor's concurring opinion in *Sweet Home* to buttress their argument that the ESA's taking prohibition does not apply to state officials exercising regulatory authority. See Petition at 16, 25-26. But Justice O'Connor's discussion of proximate cause directly supports the Court of Appeals' decision. As she explained:

> We have recently said that proximate causation 'normally eliminates the bizarre,' and have noted its 'functionally equivalent' characterizations in terms of foreseeability ('natural and probable consequence') and duty. Proximate causation depends to a great extent on considerations of the fairness of imposing liability for remote consequences.

115 S. Ct. at 2420 (O'Connor, J., concurring) (citations omitted). That an act's consequences depend on the occurrence of intervening events — including the actions of third parties — does not make those consequences unforeseeable. "It is not hard to imagine conduct that, while 'indirect' (i.e., nonpurposeful), proximately causes actual death or injury to individual protected animals. . . ." *Id.* at 2419 (unnumbered footnote).

The foreseeability of injury to right whales due to permitting of fixed fishing gear in their critical habitat is indisputable. Indeed, the District Court found specifically that "the Defendants know or should know that fishing gear injures or kills endangered whales." *Strahan I,* 939 F. Supp. at 986,

App. at B-58 (citing documents prepared by or under contract for the petitioners). As the Court of Appeals recognized, prior to complying with the District Court's order, "the state [had] licensed commercial fishing operations to use gillnets and lobster pots in specifically the manner that [was] likely to result in a violation of federal law." *Strahan II*, 127 F.3d. at 164, App. at A-17. That included licensing the placement of gear, without restrictions or specifications to reduce the likelihood of entanglement and injury, in the Cape Cod Bay critical habitat during the annual period of peak right whale activity.

The decisions of the courts below reflect careful consideration of the facts in this case, including the severity of the right whale's endangered status, the importance of the Cape Cod Bay critical habitat, and the breadth and detail of the Commonwealth's fisheries regulations. As Justice O'Connor said in her *Sweet Home* concurrence, "[t]he task of determining whether proximate causation exists in the limitless fact patterns sure to arise is best left to lower courts." 115 S. Ct. at 2420 (O'Connor, J., concurring). Review by this Court is unwarranted.

B. *The Court of Appeals Followed Uniform Precedent Set by Other Federal Courts under the ESA.*

Every Federal court that has considered the question of whether a government agency exacts a prohibited taking when its regulations or other actions cause injury to endangered species has reached the same answer that the Court of Appeals did in this case. Of particular relevance is *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989) ("*Defenders*"). There, the Court of Appeals for the Eighth

Circuit held that the Environmental Protection Agency ("EPA") violated § 9(a)(1)(B)[6] when plaintiffs showed actual poisoning of endangered species by an EPA registered pesticide containing strychnine, and the pesticide could be legally distributed only if its registration were approved by EPA. *Defenders,* 882 F.2d at 1301. "The relationship between the registration decision and the deaths of endangered species [was] clear." *Id.* Equally clear in the present case is the relationship between petitioners' licensing of fixed fishing gear in critical habitat and right whale entanglement. After analyzing the petitioners' regulation of fishing, the District Court concluded that in the absence of permitting, no entanglement of whales with fishing gear could occur. *Strahan I,* 939 F. Supp. at 985, App. at B-57; *see Strahan II,* 127 F.3d at 163, App. at A-15.[7]

Numerous other Federal courts have similarly held that government agencies violate the ESA's taking provision when their actions indirectly cause injury to endangered species. *See, e.g., Sierra Club v. Yeutter,* 926 F.2d 429, 438-39 (5th Cir. 1991) (finding the U.S. Forest Service's management of timber stands was a taking of the red cockaded woodpecker in violation of the ESA); *Palila v. Hawaii Dept.*

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[6] It is important to note that the holding in *Defenders* was grounded solely on the prohibition against takings in Section 9(a)(1)(B) and not on other duties imposed by the ESA on Federal agencies. *See Defenders,* 882 F.2d at 1300 ("Defenders do not appeal the [district] court's rejection of their other assertions of ESA violations. Thus, we consider only the takings issue.").

[7] The petitioners claim that "there is not even 'but-for' causation in this case." Petition at 27. That assertion ignores the fact that the applicable state statutes prohibit *all* commercial fishing, including lobster fishing, except as permitted by the petitioners. See Mass. Gen. Laws Ann. ch. 130, §§ 37, 38, 80.

of Land and Natural Resources, 852 F.2d 1106 (9th Cir. 1988) ("*Palila II*")[8] (holding the state's maintenance of mouflon sheep on state land where they were destroying habitat of the palila constituted a taking); *Loggerhead Turtle v. County Council of Volusia County,* 896 F. Supp. 1170, 1180-81 (M.D. Fla. 1995) (holding that a county's authorization of vehicular beach access during turtle mating season exacted a taking of turtles). These cases were all cited by the Court of Appeals, *see Strahan II,* 127 F. 3d at 163, App. at A-15 to A-16, and by the District Court, *see Strahan I,* 939 F. Supp. at 983, 987, App. at B-52, B-61 to B-62.[9] This is thus not an instance involving a conflict among courts of appeals, or

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[8] This Court granted certiorari in *Sweet Home* to resolve the "square conflict" between the decision of the Court of Appeals for the D.C. Circuit in that case and the Ninth Circuit's in *Palila II.* 115 S.Ct. at 2412. Although the direct conflict was over the issue of whether the Secretary of the Interior's definition of harm were valid on its face, *see id.* at 2409. the opinion of the Court nowhere questioned the application of the regulation in *Palila II.* In her concurring opinion, Justice O'Connor *did* criticize the application of the definition in that case, but the crux of her criticism was that "*Palila II* — under which the Court of Appeals held that the state agency committed a 'taking' by permitting feral sheep to eat mamane-naio seedlings that, when full-grown might have fed and sheltered endangered palila — was wrongly decided according to the regulation's own terms. *Destruction of the seedlings did not proximately cause actual death or injury to identifiable birds; it merely prevented the regeneration of forest land not currently inhabited by actual birds.*" 115 S. Ct. at 2420-21 (O'Connor, J., concurring) (emphasis added). Here, there is no question that entanglement with fishing gear permitted by the petitioners has injured identifiable right whales. *See Strahan I,* 939 F. Supp. at 984-85, App. at B-52 to B-56.

[9] The District Court cited additional cases applying the taking prohibition on facts analogous to those in this case. *See Strahan I,* 939 F. Supp. at 983-85, App. at B-51 to B-52, B-57.

otherwise calling for an exercise of this Court's supervisory power. *See* Sup. Ct. R. 10.

Petitioners attempt to dismiss these precedents because they did not deal with "state regulatory agencies," Petition at 27 n.21, but this purported distinction is immaterial. *Palila II* stands for the proposition that the prohibition contained in § 9(a)(1)(B) applies to state agencies whose actions indirectly harm endangered species, in that case through modification of habitat. *Defenders* establishes that a Federal agency's regulation of a substance, the lawful use of which required the agency's approval, violates the statute when the substance kills endangered species. Together, these cases and the others cited above fully support the decision of the Court of Appeals in this case. In none of them did the outcome hinge on whether the agency were Federal or state, or whether it acted in a regulatory or proprietary capacity. In the context of the ESA, proximate cause depends not on the capacity of the actor but on the causal relationship between the action and the result (cause-in-fact), and the foreseeability of harm. In light of the uniformity with which Federal courts have interpreted and applied the ESA's taking prohibition, compelling reasons for review by this Court are absent.

II. THE COURT OF APPEALS CORRECTLY DISTINGUISHED *NEW YORK* AND *PRINTZ*.

In *New York,* this Court held unconstitutional under the Tenth Amendment[10] a provision of the Low-Level Radioac-

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[10] The Tenth Amendment provides that: "The powers not delegated to the United States by the Constitution, nor prohibited to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

tive Waste Act, 42 U.S.C.A. § 2021e(d)(2)(C) (West 1994 & Supp. 1996), that required a state which failed to provide for waste disposal in accordance with Federal policy to take title to low-level radioactive waste upon the request of the generator or owner. *See* 505 U.S. at 153, 174-77. The Court pointed out that "[m]ost of our recent cases interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to generally applicable laws." *Id.* at 160. But *New York* was not such a case: it "concern[ed] the circumstances in which Congress may use the States as implements of regulation." *Id.* The statutory provision under scrutiny in *New York,* in other words, directed its commands exclusively to the states and not generally. The ESA, however, *is* generally applicable.[11]

As the Court of Appeals stated, "a valid act of Congress, enacted pursuant to its Commerce Clause powers, seeking to regulate a particular area, is the 'supreme law of the land,' and preempts state laws or regulations that conflict with the act." *Strahan II,* 127 F.3d at 167, App. at A-26 (citing U.S. Const. art. VI, cl. 2 (the supremacy clause)). The Court of Appeals expressly followed this Court's summary of case law in *New York,* which stated that "'where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of either regulating in this area according to federal standards or having state law preempted. . . .'" *Strahan II,* 127 F.3d at 170, App. at A-33 (quoting *New York,* 505 U.S. at 167). In *New York,* moreover, this Court drew a clear distinction between Congressional commands that states implement a federal regulatory program and cases upholding

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[11] As discussed in Section I.A. above, the ESA's taking provision applies to any "person," and person is defined broadly. *See* 16 U.S.C.A. §§ 1538(a)(1)(B), 1532(13).

"the power of federal *courts* to order state officials to comply with federal law." 505 U.S. at 179 (emphasis in original; citations omitted). "[T]he text of the Constitution plainly confers this authority on federal courts. . . ." *Id.*

The Court of Appeals focused on the precise nature of the District Court's order requiring the petitioners to convene the Working Group and develop a proposal for modified fishery regulations. First, it emphasized what the order did *not* do. "The district court did not order the Commonwealth to ban gillnet and lobster pot fishing although the defendants incorrectly, and repeatedly, so claim throughout their brief." *Strahan II,* 127 F.3d at 168, App. at A-29. Instead, the District Court allowed the petitioners to determine exactly how to conform their regulations to the requirements of the ESA:

> The situation is not one in which the district court has directed the state to enact a particular regulatory regime that enforces and furthers a federal policy. . . . Rather, the court directed the defendants to find a means of bringing the Commonwealth's scheme into compliance with federal law.

Strahan II, 127 F.3d at 169-70. Indeed, the District Court had expressly noted "[t]he difficulty . . . in fashioning an injunction that respects the contours of both the powers and limitations of a federal court and the protection afforded to an endangered species." *Strahan I,* 939 F. Supp. at 989.

On the facts of this case, *Printz* adds nothing to this analysis under *New York.* In *Printz,* this Court held that "Congress cannot circumvent [the *New York*] prohibition by conscripting the State's officers directly." 117 S. Ct. at 2384.

The statutory provision at issue in that case directed its command to implement a federal regulatory program at state law enforcement officers, rather than at the states themselves. As the Court of Appeals recognized, in *Printz* this Court simply followed the reasoning of *New York*. *See Strahan II*, 127 F.3d at 169, App. at A-31. *Printz* is therefore similarly distinguishable from the instant case. The opinion of the Court of Appeals was thus consistent with both *New York* and *Printz* and presents no conflict on this ground with decisions of this Court.

III. The Petition Raises No Issue of Substantial Public Interest Justifying Discretionary Review by this Court.

In a decision applying a predecessor to Sup. Ct. R. 10, the Court stated that "this Court does not sit to satisfy a scholarly interest in . . . issues." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). "'Special and important reasons'[12] imply a reach to a problem beyond the academic or episodic." *Id.* In the instant case, however, reversal of the Court of Appeals' decision would not change the substantive rules applicable to fishing gear in the right whale critical habitat.

This case involves two significant public interests, but review by this Court will affect neither. The first is the public interest underlying the ESA itself. In the frequently quoted

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[12] *Compare* Sup. Ct. R. 19 (in effect when *Rice* was decided and requiring "special and important reasons" to grant a writ of certiorari) *with* Sup. Ct. R.10 (requiring "compelling reasons"). The current rule does not appear to have lowered the threshold.

words of this Court, "examination of the language, history, and structure of [the ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities. . . . The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." *TVA v. Hill,* 437 U.S. 153, 174, 184 (1978). A secondary but legitimate interest is that of Massachusetts and its fishermen in their economic livelihood. But even if this Court were to grant a writ of certiorari and ultimately reverse the decision below, and even if the petitioners then rescinded their regulations protecting right whales from entanglement, there would be no change in the way these two interests intersect. In the waters of Cape Cod Bay, substantially the same fishery regulations would still apply under Federal authority.

Because NMFS has adopted regulations that "mirror" those of the Commonwealth adopted in response to the District Court's order, 62 Fed. Reg. at 39,170, virtually the same measures protecting right whales and restricting commercial fishing would remain in place. *Compare* 62 Fed. Reg. at 39,183-88 *with* Mass. Regs. Code tit. 322, § 12. Although there are differences in the details of the two regulatory programs, the practical effect of these differences on whales and fishermen is minor. An appeal whose reach would be merely academic to the real interests at stake is hardly sufficient to warrant review by this Court.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari to review the decision of the Court of Appeals for the First Circuit in this case.

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Date: April 3, 1998